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ABSTRACT

This report is intended as a guide to judges, prosecutors, legislators, and other involved professionals who are interested in implementing strategies or modifying existing practices to improve the treatment of child victims and witnesses in their jurisdictions. Part I of this document provides an overview of the literature and a preliminary explanation of the problems faced by child victims in the criminal justice system. The two chapters in this section show the current state of affairs and support the premise that child victims have special needs in the criminal justice system. Part II, Innovative Practice: Legal Issues and Practical Concerns, presents a discussion of popular techniques used to ameliorate some of these problems. The discussion of these innovations has been divided into topic areas, with separate chapters examining: (1) competency of child witnesses; (2) exclusion of spectators; (3) attempts to avoid direct confrontation; (4) videotaped depositions and statements; (5) special exceptions to hearsay; (6) use of expert witnesses; (7) the victim advocate; and (8) streamlining the adjudication process. Each of these chapters includes a discussion of the legal and practical concerns that arise from these innovations. Part II includes a state-by-state chart of current statutory provisions relevant to child victims and witnesses and a list of complete citations for the statutes analyzed. Part III contains conclusions and establishes the need for further research in the field. Appendices contain guidelines for interviewing child victims; conditions imposed on the use of videotaped presentations; and guidelines for videotaping a child's statements. (NB)

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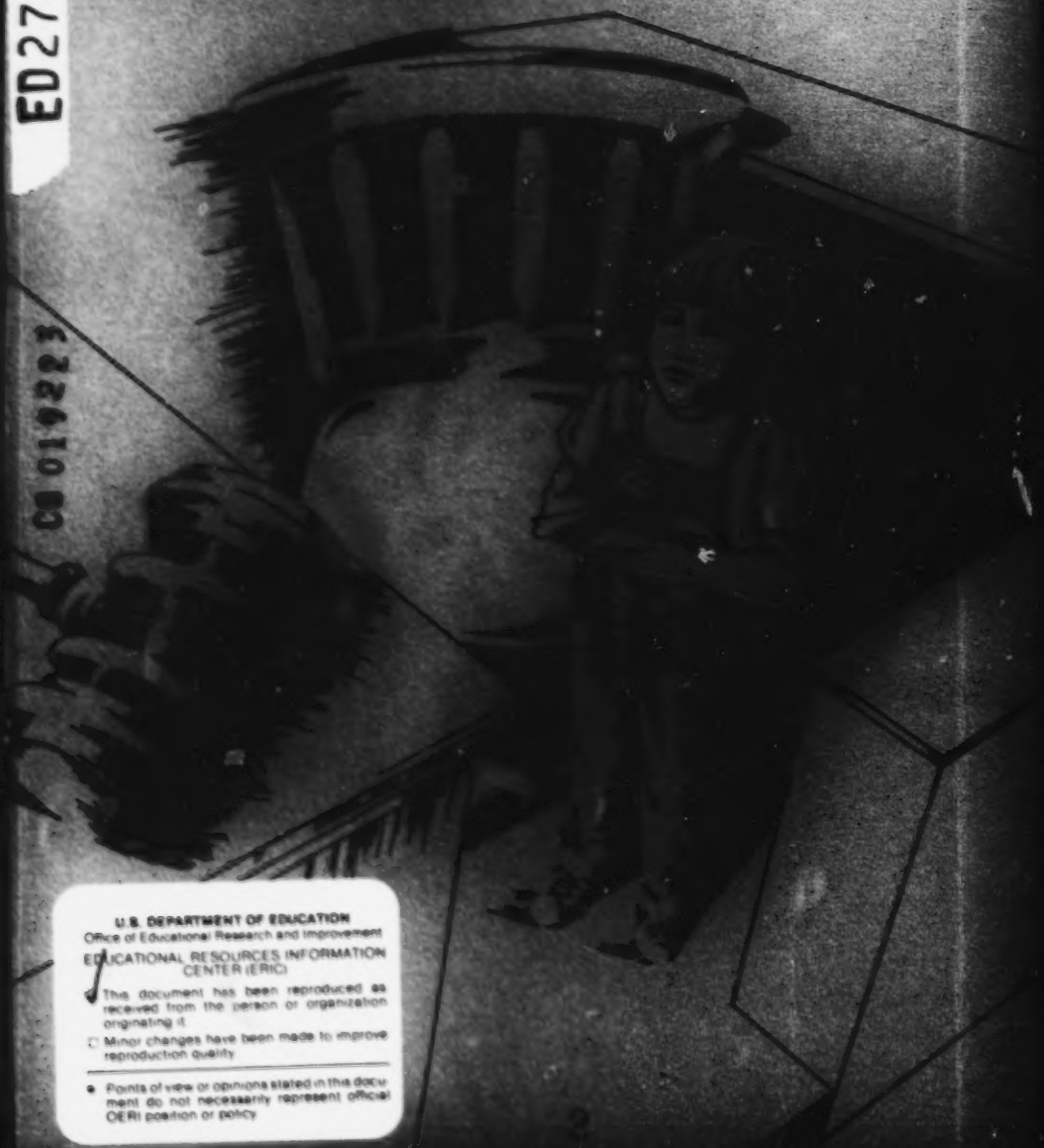

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- Providing better and more cost-effective methods for managing the criminal justice system
- Assessing the impact of probation and parole on subsequent criminal behavior
- Enhancing Federal, State, and local cooperation in crime control

James K. Stewart
Director

U.S. Department of Justice
National Institute of Justice
Office of Development, Testing and Dissemination

When the Victim Is a Child: Issues for Judges and Prosecutors

by

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August 1985

Issues and Practices in Criminal Justice is a publication series of the National Institute of Justice. Designed for the criminal justice professional, each *Issues and Practices* report presents the program options and management issues in a topic area, based on a review of research and evaluation findings, operational experience, and expert opinion in the subject. The intent is to provide criminal justice managers and administrators with the information to make informed choices in planning, implementing and improving programs and practice.

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FOREWORD

More than 90 percent of all child abuse cases do not go forward to prosecution. In many of these cases, the decision not to proceed is based on concerns about the child's possible performance on the witness stand or the impact of the court process on the child victim's recovery. The unfortunate result is that many suspects are released without the imposition of justice. They not only escape any penalty but have the opportunity for further abuse of their initial victim or other children.

Both community members and criminal justice professionals are increasingly concerned about our apparent ineffectiveness in dealing adequately with the crime of child sexual abuse. This report, part of the National Institute of Justice series on Issues and Practices in Criminal Justice, reviews research on the credibility of child witnesses and suggests new and creative ways of reducing the trauma of trial preparation and court appearances on children who are victims of sexual abuse. At the same time, the approaches outlined maintain the rights of the accused and the integrity of the judicial system.

James K. Stewart
Director
National Institute of Justice

PREFACE

There is nationwide concern over the plight of child victims and witnesses of crime. Every day the public is affronted with news stories of terrifying victimization of children. Prosecutors are increasingly faced with a perplexing dilemma: Should they risk putting an unpredictable, emotionally fragile child through the adjudication process, and possibly on the witness stand? Or should they spare the child that trauma, knowing that the case may not be tried and the child may return to an abusive environment?

The problems that arise when seeking justice for young victims have not gone unnoticed. In September 1984, the Attorney General's Task Force on Family Violence published its final report urging legislators, judges, and prosecutors to adopt new procedures for dealing with incidents of family violence. Among those recommendations were several directed specifically to the unique circumstances of child abuse. Several states have already adopted laws that permit alternative--and some very controversial--techniques for prosecuting cases involving child victims. Today, nearly every legislative body in the country is considering bills designed to reduce what many view as the continued victimization of children in the criminal justice system.

Although there is considerable material encouraging the use of certain innovations and there are many dedicated individuals throughout the country facilitating change, there is a paucity of documentation of the actual implementation and outcomes of the various techniques. Recognizing this gap in available information, the National Institute of Justice commissioned this Issues and Practices Report.

Methodology

Our research began with an extensive literature search in order to review the current status of the laws and research on child victims and

their role in the criminal justice system. Although our study was not intended to focus exclusively on child victims of sex crimes, our preliminary investigations soon indicated that such a focus is both necessary and appropriate. The available data, presented in Chapter 1, reveal that sex offenses are among the crimes most often committed against children. (Physical abuse is committed most frequently.) Moreover, according to prosecutors we interviewed across the country, most of the children involved in criminal proceedings are victims of sex crimes. And, as we shall see, many of the alternative procedures designed for child victims are expressly limited, by statute, to child sexual abuse victims. For these reasons, this report necessarily concentrates most heavily on reforms geared to child victims of sex offenses, including incest. It is our contention, however, that other categories of child witnesses, such as victims of kidnapping or witnesses of parental homicide, have many of the same needs as child sexual abuse victims and deserve equal consideration in the criminal justice system.

The National Legal Resource Center for Child Advocacy and Protection of the American Bar Association made available to us the raw data from its 1981 mail survey of prosecutorial practices used with child victims. We followed up with a more detailed telephone survey of prosecutors and victim advocates in selected jurisdictions that either had one or more innovative statutes or were reportedly using innovative procedures to prosecute cases involving child victims.

Several jurisdictions emerged from those surveys as particularly innovative or progressive in their work with child victims. Information about ten potential sites, including caseload, interviewing procedures, and pertinent statutes, was presented to our advisory board, who lent their insight and knowledge to the final selection of four sites to be visited for in-depth investigation: Des Moines, Iowa; Milwaukee, Wisconsin; Orlando, Florida; and Ventura, California. The selection of sites should not be construed to mean that these locations are representative of the rest of the country, or on the other hand, that they are the only sites where innovation is underway.

At each site we met with prosecutors, defense attorneys, victim/witness advocates, child protection workers, law enforcement officers, and judges in an effort to gather factual information, opinion, and anecdotal material about the implementation of innovative techni-

ques, as well as to identify gaps in the information available to these criminal justice professionals.

As our research evolved, it became clear to us that there were many people, nationwide, attempting to do a great deal to ease the experience for children involved in the criminal justice system. It also became clear, however, that there was no source of national information on these reforms. Though the literature was rife with support of various statutes aimed at protecting the child witness, and many states are considering adoption of various rules and statutes, there appeared to be no clear overview of the existing laws or their specific provisions. It was evident that this kind of investigation was necessary to any further discussion of what should or should not be done for child victims, how well reforms might work, and how widely they can be used.

Consequently, in August 1984 we contacted the legislative reference service and one prosecutor's office in each state, requesting copies of pertinent statutes, bills, court rules, and case law. Additional statutes were obtained from preliminary research conducted by Dorothea Sinner, a summer legal intern with the National Institute of Justice, and by Randall Wilson, Esq., staff attorney with the Youth Law Center in Des Moines, Iowa. Lindsey Stellwagen, Esq., of Abt Associates staff prepared the analytic chart that appears as Exhibit 1 on pp. 27-28.

The following chapters provide a more detailed discussion of how these laws translate into courtroom practice. Where available and appropriate, seminal or otherwise noteworthy cases and law review articles are cited to illustrate important legal concerns with many of the proposed reform techniques. It must be noted, however, that an exhaustive case review was far beyond the scope and intent of our study. Many of these issues are hotly debated and extremely complex, and we defer to the legal scholars and the courts to resolve these questions in the years to come.

Guide to the Report

This document is intended as a guide to judges, prosecutors, legislators, and other involved professionals who are interested in implementing strategies or modifying existing practices to improve the treatment of child victims and witnesses in their jurisdictions. It is our hope that this Issues and Practices Report will inform continuing progress in the

field and will spur additional empirical research into the effects of the criminal justice system and the popular modifications of that system on children. It is, after all, by no fault of their own that they are a part of that system.

Part I of this report provides an overview of the literature and a preliminary explanation of the problems faced by child victims in the criminal justice system. Chapter 1--An Introduction to the Problem--shows the current state of affairs, while Chapter 2--Why Are Child Victims Different?--supports the premise that child victims have special needs in the criminal justice system.

Part II presents a discussion of popular techniques used to ameliorate some of those problems. The discussion of these innovations has been divided into topic areas which include: Competency, Exclusion of Spectators, Attempts to Avoid Direct Confrontation, Videotaped Depositions and Statements, Special Exceptions to Hearsay, Use of Expert Witnesses, The Victim Advocate, and Streamlining the Criminal Justice System. For each chapter we have included a discussion of the legal and practical concerns that arise from these innovations. Part II includes a state-by-state chart of current statutory provisions relevant to child victims and witnesses (Exhibit 1) as well as a list of complete citations for the statutes analyzed (Exhibit 2).

Part III contains conclusions reached by the authors and establishes the need for further research in the field.

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There are many individuals to thank for the completion of this report. We turned to advisors to define the tone and scope of our discussion; their input was invaluable. We are also indebted to the numerous individuals on-site who gave of their time, energy and insight before, during and after our visits. We were continually impressed with the devotion and drive of the professionals with whom we spoke, many of whom are immersed on a day-to-day basis in the details of horrifying cases. It is their ability to listen, their respect for legal standards and individual rights that are the driving force of progress in this field. Our thanks are also owed to Howard Davidson of the ABA's National Legal Resource Center for Child Advocacy and Protection for making the raw data on prosectorial practices available to us, and to Josephine Bulkley of that same organization, who lent direction to our statutory review and thoughtfully examined our final report.

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PART I

INTRODUCTION AND OVERVIEW

I. AN INTRODUCTION TO THE PROBLEM

It is a sad commentary on modern society that children, like adults, become victims of crime. Any crime that can be committed against an adult can be perpetrated as easily (if not more so) upon a child. What is perhaps even more appalling is the fact that so little is known about the incidence and types of crimes committed against children. We do not even know the true magnitude of the problem.

How Many Children are Victimized?

There is no single data source to consult for statistics on crimes committed against children. Although several sources provide partial information, attempts to develop a composite are confounded by variations in definitions and reporting practices. For example, sources define the end of childhood at different ages, varying from 12 to 16, 18 to 21. Some sources provide only "snapshot" views of crimes occurring during a brief time period and have not been routinely updated. Existing sources are also limited in the types of crimes for which they collect data on child victims. Admittedly, the available data are sketchy, but they do suggest that children become victims of crime more often than some may care to believe.

The FBI's Uniform Crime Reports (UCR) publishes crime statistics contributed by nearly 16,000 law enforcement agencies covering 97 percent of the American population. While the UCR offers the most comprehensive picture of reported crime in the United States, it provides almost no information on crimes against children. With the exception of murder, UCR statistics are not reported by victim age. Still, for that crime alone, the FBI reported that in 1983, 893 children under the age of 15 were victims, nearly five percent of the total.[1]

The National Center on Child Abuse and Neglect (NCCAN), a division of the Department of Health and Human Services, focuses its data collection efforts exclusively on incidents of child maltreatment. These data, too, are incomplete, for they consider only reports of abuse or neglect inflicted by a parent or caretaker and known to child protection agencies in each state. Even so, the statistics are alarming: in 1983, child protection agencies across the country received allegations of child maltreatment affecting an estimated 1.5 million children. The tally of cases involving children reported as sexually maltreated that year is estimated at 71,961.[2]

It is well-known that reported crimes represent only the tip of the iceberg. The Bureau of Justice Statistics estimates that only one-third of all crimes, and 47 percent of violent crimes, are reported to police.[3] Moreover, young victims are only half as likely as the total population to report crimes to police.[4] In an effort to capture crimes that are not reported to enforcement authorities, the National Crime Survey (NCS) compiles offense data from household surveys. NCS does not collect data for children under age 12, but data for 1981 show that respondents in the 12-15 age group suffered a rate of victimization exceeded only by that of the 16-19 and 20-24 age groups. This was true for both crimes of violence and theft.[5]

In another study which sheds light on unreported crime, the National Institute of Education (NIE) collected self-report data on crimes occurring in schools over a one-month period in 1976. The authors found that among high school students, 15 percent had been victims of larceny, three percent had been assaulted, and four percent had been robbed. Among junior high school students, 16 percent had been victims of larceny, seven percent had been assaulted, and four percent had been robbed.[6]

In recent years, widespread media publicity about child sexual abuse and incest has prompted several researchers to investigate the actual incidence of those crimes. Table 1 displays the findings of six such studies, all based on retrospective self-reports of childhood experiences. Although these studies are not strictly comparable due to variations in definitions and research methodology, their findings suggest that anywhere from 12 to 38 percent of all women, and from three to 15

TABLE 1

ESTIMATED INCIDENCE OF CHILD SEXUAL ABUSE
BASED ON RETROSPECTIVE SELF-REPORTS

AUTHOR	ESTIMATE	VICTIM AGE RANGE	STUDY CHARACTERISTICS	CAVEATS
Kinsey (1953)[1]	24% of women	"Pre-adolescent"	Personal interviews, 4,441 volunteer subjects	Excludes peer experiences; more than half the offenses were exhibitionism
Finkelhor (1979)[2]	19% of women 9% of men	through age 16	Self-administered questionnaire; 796 college students	Excludes peer experiences; 20% of offenses were exhibitionism
Kercher (1980)[3]	12% of women 3% of men	"Child"	Mail survey, 2,000 Texas drivers	Sexual abuse undefined
Finkelhor (1984)[4]	15% of women 5% of men	through age 16	Household survey; 521 Boston area parents	Excludes peer experiences
Russell (1983)[5]	38% of women	through age 18	Personal interviews; random sample of 933 adult women in San Francisco	Includes peer experiences; excludes exhibitionism; questions very detailed
Committee on Sexual Offenses Against Children and Youth, Canada (1984)[6]	27% of women 15% of men	before age 16	National Population Survey 2,008 respondents	Includes peer experiences; 28% of offenses were exhibitionism; questions very detailed

1. Alfred Kinsey, et al., Sexual Behavior in the Human Female (Philadelphia: Saunders, 1953).

2. David Finkelhor, Sexually Victimized Children (New York: Free Press, 1979).

3. Glenn Kercher, Responding to Child Sexual Abuse. A Report to the 67th Session of the Texas Legislature (Huntsville, TX: Sam Houston State University, 1980).

4. David Finkelhor, "How Widespread is Child Sexual Abuse?" Children Today, Vol. 13 (July-August 1984): 18-20.

5. Diana Russell, "The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children," Child Abuse and Neglect, Vol. 7 (1983).

6. The Committee on Sexual Offenses Against Children and Youth, Sexual Offenses Against Children (Ottawa, Canada: Minister of Supply and Services, 1984), pp. 179-193.

percent of men, are subjected to some form of sexual abuse in their childhood.

What are the Barriers to Reporting?

No one knows the proportion of crimes against children that is reported to law enforcement or child protection authorities. Indeed, even the child's most trusted confidante may be unaware that something has happened. Very young children may simply lack the verbal capacity to report or the knowledge that an incident is inappropriate or criminal. Older children may be embarrassed. Many child victims are threatened into silence. When they do confide in trusted adults, their reports may be dismissed as fantasy or outright lies.

Even if a child's report is believed by a parent or trusted adult, it may never come to the attention of authorities. One survey of Boston parents found that, of the 48 families in which a child had been sexually abused, 56 percent of the parents had reported the crime to authorities.[7] When the nonreporters were asked about their reasons for not reporting, they said that they preferred to handle the situation themselves, and that it was no one else's business. They felt sorry for the abuser, did not want to get him "into trouble," and simply wanted to forget the incident.[8] These responses probably reflect the fact that most of the nonreported cases had involved perpetrators within the family.

Studies have also found that child-serving professionals, such as doctors[9] and social workers,[10] often fail to file official reports when they suspect child abuse. Such professionals often prefer to enroll troubled families in counseling, substance abuse treatment, or other social services. Even so, the number of child sexual abuse allegations known to child protection agencies has been rising steadily since 1976, the year in which NCCAN began collecting data on these crimes. That year, child protection agencies reported 1,975 cases of child sexual abuse nationwide.[11] As noted above, there were an estimated 71,961 cases in 1983. There is no way of knowing whether these figures reflect increases in actual incidence or increases in reporting as the result of widespread media coverage and prevention campaigns. In fact, there is a growing fear that the pendulum may be swinging too far the other way, i.e., that authorities may be too quick to accept allegations of child

sexual abuse and to prosecute innocent persons on the basis of false accusations. To guard against this possibility and to strengthen their investigations, criminal justice and child protection agencies should be fully informed of the dynamics of child sexual abuse, principles of child development, and interviewing techniques that obtain complete, accurate descriptions without leading the child or encouraging embellishments.

How Does the Justice System Respond?

The Child Abuse and Neglect Prevention Act of 1974 required that every state designate an agency to receive reports of alleged abuse of children (including sexual abuse) by parents or caretakers. Most states designated their departments of social services, but there is great variation and controversy as to whether and when reports must also be made to police. This problem is compounded by a general reluctance among police to work with social workers, and vice versa. There is some evidence suggesting that cases initially reported to police are twice as likely as those reported to child protection agencies to result in criminal prosecution.[12] But in many communities around the country, efforts are underway to encourage greater cooperation between police and child protection workers. This trend may result in more cases being brought for prosecution.

Of the four sites we visited for this study, prosecutors' offices in Des Moines and Milwaukee keep records on the proportion of child sexual abuse cases accepted for prosecution. In Milwaukee, one of the three assistant district attorneys in the Sensitive Crimes Unit had reviewed 44 incest cases in the first six months of 1984, of which 26 (59%) were filed.[13] In Des Moines, the County Attorney's Office reviewed 56 cases of intrafamilial sexual abuse in calendar year 1983, of which 36 (64%) were filed.[14] One should keep in mind, however, that the sites visited in the course of this study were not intended to be representative or typical in this regard.

Prosecution rates increase, however, when other crimes against children are considered. For a national picture, prosecutors responding to a 1981 survey of the American Bar Association reported that roughly three-fourths of intrafamily child sexual abuse cases, and four-fifths of nonfamily cases, resulted in prosecution.[15] It should be noted, however,

that many respondents to the ABA survey acknowledged that their figures were "off-the-cuff" estimates, since few prosecutors' offices routinely keep data to track the progress of child sexual abuse cases. And, according to the Bureau of Justice Statistics, nine of every ten persons arrested for crimes against children (which include kidnapping, sexual assault, other sexual offenses, and family offenses) are prosecuted.[16]

There are several reasons why some child sexual abuse cases, particularly intrafamilial cases, do not result in criminal prosecution. Cases that involve juvenile perpetrators are typically pursued in juvenile court. Some offenders are "diverted" into a supervised treatment program, and prosecution is deferred pending its outcome. Sometimes prosecutors and families choose not to subject a child to the perceived trauma of the criminal justice process. (This will be discussed more fully in Chapter 2.) But often, the decision not to prosecute hinges on characteristics of the victim or the case: the crime could not be established; the evidence was considered insufficient; the victim was perceived to be incompetent, unreliable, and/or not credible as a witness.[17]

From the prosecutor's perspective, victim and offense characteristics are perfectly sound reasons to decline a case. But what happens to the children when their cases are not prosecuted? Victims of stranger abuse may feel that no one believed them, and they may fear being victimized again. These children are sometimes at an advantage, because with counseling and a supportive family, they may overcome some of the long-range effects of victimization. Victims of intrafamily abuse, however, are not so lucky. When their cases are not prosecuted in the criminal courts, the best they can hope for is a favorable outcome of juvenile court intervention. Perhaps the offender will obey a no-contact order. Perhaps he will be amenable to treatment. But in many cases, removing child victims from their homes and placing them in foster care is necessary as a last resort of the juvenile courts. This may feel like punishment to the child and leaves habitual offenders free to molest others.

> Why should I have been taken out of the home? I was the victim. I had nothing. I did nothing wrong. My father should have been taken out, not me.[18]

Arguably (and again, this is treated more fully in Chapter 2), the criminal justice system may be just as traumatic to the child victim as being placed in shelter care. On the other hand, some victim counselors believe that criminal prosecution, if handled with sensitivity, can be therapeutic for the child.[19] It tells the child that society is taking the allegation seriously, and a conviction, if obtained, places the blame squarely on the perpetrator. Also, many prosecutors and victim advocates recommend concurrent juvenile court proceedings to ensure that the child will be protected in the event of an acquittal.[20]

What are the Outcomes of Prosecution?

As with other criminal cases, child sexual abuse cases are more often settled by guilty plea than by adjudication at trial. Respondents to the ABA survey estimated that about two-thirds of intrafamily cases are settled by guilty plea, compared to a slightly smaller proportion in all child sexual abuse cases.[21] But the plea rates appear to be quite variable. In Orlando, one judge estimated that more than 80 percent of child sexual abuse cases are settled by guilty plea; one prosecutor had not seen a case go to trial in her two and one-half year tenure with the State's Attorney's Office.[22] In Des Moines, however, only seven of 22 defendants (19%) whose cases were disposed in 1983 pleaded guilty; nine (41%) went to trial. (Four cases were dismissed and two cases were revoked on other charges.)[23] In Ventura, there were 82 filings and 26 trials in 1983, for a trial rate of 32 percent.[24]

There are many reasons for the variations in plea/trial rates. In Ventura, the District Attorney maintains a strict policy of accepting pleas only to the most serious charge, and the efforts of SLAM (Society's League Against Molestation) in California have succeeded in removing the option of sentencing to treatment under a "sexual psychopath" statute. Once these changes were introduced, the trial rate for child molestation cases in Ventura County increased dramatically, moving from 11 percent in 1981 to 32 percent in 1983.[25] In contrast, defendants may be more likely to plead guilty where sentences are perceived to be lenient, or where prosecutors are generally reluctant to take these cases to trial. Indeed, many sexual abuse cases are handled with pleas to lesser offenses that are not sex related.

Provided the sentence will be appropriate, guilty pleas are often preferred in child abuse cases, since the child is saved from testifying at trial. Recall, however, that even a guilty plea depends, to some extent, on input from the child. The child's initial statement to police and subsequent testimony at a deposition, preliminary hearing, or grand jury (depending on local law and custom)--are all critical junctures in which the child plays a major role. Especially in sexual abuse cases, the child may be the only source of evidence. It is therefore imperative that police, prosecutors, and judges recognize the importance of maximizing the child's contribution to all the pretrial activities.

* * *

Due to high levels of media attention and public outrage over sexual crimes against children, law enforcement and social service agencies are recording ever higher numbers of reports. More and more cases of child sexual abuse are being brought to the criminal courts; more and more children are entangled in the complexities of the criminal justice system. It is not only fitting, but absolutely critical, that judges and prosecutors begin to understand the special needs of child witnesses, since children's participation can be so vital to the adjudication process.

FOOTNOTES

1. U.S. Department of Justice, Federal Bureau of Investigation, Uniform Crime Reports: Crime in the United States, 1983 (Washington, D.C.: Government Printing Office, 1984), p. 8.

2. U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect, National Study on Child Neglect and Abuse Reporting (Denver: American Humane Association, 1984).

3. U.S. Department of Justice, Bureau of Justice Statistics, Report to the Nation on Crime and Justice (Washington, D.C.: Bureau of Justice Statistics, 1983), p. 19.

4. U.S. Department of Justice, Bureau of Justice Statistics, Criminal Victimization in the United States, 1981 (Washington, D.C.: Government Printing Office, 1983), Tables 92 and 95.

5. U.S. Department of Justice, Report to the Nation, supra, note 3, at p. 24.

6. U.S. Department of Health, Education and Welfare (now Health and Human Services), National Institute of Education, Violent Schools--Safe Schools, Vol. I (Washington, D.C.: Government Printing Office, 1978), p. 3.

7. David Finkelhor, "Child Sexual Abuse in a Sample of Boston Families," in Child Sexual Abuse: New Theory and Research, ed. D. Finkelhor (New York: The Free Press, 1984).

8. Ibid.

9. J. James and J. Womack, "Physician Reporting of Child Sexual Abuse," Journal of the American Medical Association, Vol. 240 (1978): 1145-1146.

10. David Finkelhor, Beverly Gomes-Schwartz, and J. Horowitz, "Agency Management of Sexual Abuse," in Child Sexual Abuse:

Theory and Research, ed. D. Finkelhor (New York: The Free Press, 1984).

11. David Finkelhor, "How Widespread is Child Sexual Abuse?" Children Today, Vol. 13 (July-August 1984): pp. 18-20.

12. David Finkelhor, "Removing the Child--Prosecuting the Offender in Cases of Sexual Abuse: Evidence from the National Reporting System for Child Abuse and Neglect," Child Abuse and Neglect, Vol. 7 (1983): 203-204.

13. Interview with John DiMotto, Assistant District Attorney, Milwaukee County, Wisconsin, August 1, 1984.

14. County Attorney's Office, "Evaluation of the Polk County Intrafamily Sexual Abuse Program," Des Moines, Iowa, July 24, 1984.

15. National Legal Resource Center for Child Advocacy and Protection, Innovations in the Prosecution of Child Sexual Abuse Cases, ed. Josephine Bulkley (Washington, D.C.: American Bar Association, 1981), p. 3.

16. U.S. Department of Justice, Bureau of Justice Statistics, Tracking Offenders: The Child Victim, Bulletin, December 1984.

17. Supra, notes 13, 14, and 15.

18. Anonymous victim, Testimony before the Attorney General's Task Force on Family Violence, 1984.

19. See, for example, Lucy Berliner, "King County's Approach to Child Sexual Abuse, Seattle, Washington," in Innovations in the Prosecution of Child Sexual Abuse Cases, supra, note 15 at p. 113; Henry Giarretto, "Humanistic Treatment of Father-Daughter Incest," in U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect, Sexual Abuse of Children: Selected Readings (Washington, D.C.: Government Printing Office, 1982), p. 45.

20. Henry Plum, "Prosecuting a Case with Child Witnesses," Paper presented at Protecting Our Children: The Fight Against Molestation, A National Symposium, Washington, D.C., October 2, 1984.

21. Supra, note 15.

22. Interviews conducted in Orlando, Florida, September 12-14, 1984.

23. Supra, note 14.

24. "Career Criminal and Sexual Assault Unit Annual Report--1983," District Attorney's Office, Ventura County, California, p. 11.

25. Ibid.

II. WHY ARE CHILD VICTIMS DIFFERENT?

Common sense and formal research would agree that children are not merely miniature adults. We know, for example, that children develop in stages during which they acquire capacities for new functions and understanding. We do not, generally speaking, read Shakespeare to a two-year-old, nor do we expect adult commentary on political issues. Adults, for the most part, attempt to speak to and treat children in accordance with their capabilities. We do not expect children to understand or function on a par with adults.

When children become victims or witnesses of violence or sexual abuse, however, they are thrust into an adult system that traditionally does not differentiate between children and adults. But, as an attorney with the Children's Hospital National Medical Center in Washington, D.C., has said:

> Child victims of crime are specially handicapped. First, the criminal justice system distrusts them and puts special barriers in the path of prosecuting their claims to justice. Second, the criminal justice system seems indifferent to the legitimate special needs that arise from their participation.[1]

What are some of the reasons for problems that arise when children are called to participate in criminal proceedings? First is the child's immaturity with regard to physical, cognitive, and emotional development. Second are unique attributes of the offenses in which children are involved, particularly intrafamilial physical and sexual abuse. This chapter explains how these characteristics affect the child witness' ability to comply with the expectations of our judicial system.

Needs Related to Immaturity

Immaturity has its most telling effect on the child's ability to answer questions. At a minimum, interviewers must be careful to use language the child understands. For example, children typically develop their own terms for their body parts. It is unlikely that children can respond adequately to questions about "sexual organs" or "fellatio." But, if allowed to use their own words or to describe what happened with dolls or pictures, children can provide scenarios rich in details. Likewise, a child may not be able to say at "what time" or "what month" something occurred, but may be able to say whether it was before or after school, what was on T.V., or whether there was snow on the ground at the time--elements that can place occurrences in time perspective for the court. In sum,

> The child and the law are better served by the child being allowed to recount the events in his or her own way, at his or her own pace, and with his or her own emphasis.[2]

The questioner must also be alert to the child's tendency to accept questions at face value. The following excerpt from a child's testimony is instructive:

Defense Attorney:	And then you said you put your mouth on his penis?
Five-Year-Old-Child:	No.
Defense Attorney:	You didn't say that?
Child:	No.
Defense Attorney:	Did you ever put your mouth on his penis?
Child:	No.
Defense Attorney:	Well, why did you tell your mother that your dad put his penis in your mouth?
Child:	My brother told me to.

At this point, it looked as if the child had completely recanted her earlier testimony about the sexual abuse and had only fabricated the

story because her brother told her to. However, the experienced prosecuting attorney recognized the problem and clarified the situation:

Prosecuting Attorney:	Jennie, you said that you didn't put your mouth on daddy's penis. Is that right?
Child:	Yes.
Prosecuting Attorney:	Did daddy put his penis in your mouth?
Child:	Yes.
Prosecuting Attorney:	Did you tell your mom?
Child:	Yes.
Prosecuting Attorney:	What made you decide to tell?
Child:	My brother and I talked about it, and he said I better tell or dad would just keep doing it.[3]

These kinds of cognitive limitations are common among children of varying ages and may surface regardless of the nature of the incident that necessitates an interview with the child. Police, prosecutors, defense attorneys, and judges must be aware, not only of the child's limitations, but also of ways to circumvent these limitations and extract the most complete, accurate testimony possible. The Sexual Assault Center in Seattle, Washington, has prepared interview guidelines for criminal justice system personnel, attached in Appendix A.

Children's Reactions to Victimization

There are few in our society who would argue that child sexual abuse does not cause serious problems for its victims. In addition to physical injury, the psychological effects of victimization on children are far-reaching, negative, and complex. Child victims have been shown to suffer from anxiety-filled dreams, disorganized thought, bed-wetting, and other psychosomatic symptoms. They may withdraw from those around them and exhibit antisocial, delinquent, or behavioral problems.[4]

There are three major determinants of how a child copes with the trauma of abuse, neglect, or molestation: (1) the child's stage of development prior to being victimized, (2) the specific circumstances

surrounding the incident, and (3) the reactions of trusted adults to the disclosure of abuse.

The first determinant of a child's reaction to victimization has to do with the child as an individual. In general, children are less in control of their environment and circumstances, more dependent on others, and more vulnerable than adults, both physically and psychologically. Children must make conclusions about their worlds based on limited experience. They are still establishing bases of trust and personal boundaries, and have yet to develop their concepts of sexuality. The trauma surrounding abuse could complicate, thwart, or even serve to arrest normal development. As one physician has said of child molestation:

> It is an experience that interferes or has potential to interfere with a child's normal, healthy development. It is an experience with which the child may not be able to cope physically, intellectually, or emotionally.[5]

Circumstantial factors that influence the child's reaction to the abuse include the relationship between the child and the offender, whether the abuse or assault is an isolated incident or an ongoing occurrence, the degree of violence involved, and how the offender engages the child in sexual activity (in cases where the abuse is sexual in nature).[6] Children are entirely subordinate to and dependent upon the adults in their lives. Assault or abuse by these trusted individuals can shatter the victims' self image, lowering their self esteem and disturbing their conceptions of power and trust.

Perhaps the most influential factor for children is the reactions of those to whom they report the incident, whether they be doctors, police, attorneys, or parents. If those people are supportive and act as though they believe the child, if they offer a sense of security and reassure the child that he or she is not to blame, the child may stand a better chance of recovery.[7] But children who are abused by a family member are in a "no win" situation. If they tell no one, the abuse is likely to continue. On the other hand, if they do tell someone, they are likely to be disbelieved. Once their cases reach the attention of authorities, these child victims are often pressured in ways that adversely affect the quality of their testimony. They may be blamed for having put Daddy in jail and forcing the family to go on welfare. Clearly, the pressure on these

children to recant or change their stories is quite intense. Children who withstand the pressure and stick with the story face the continuing hostility of their families throughout, and perhaps beyond, the adjudication process.

It is for these reasons that many practitioners prefer to keep child abuse and neglect cases in their traditional forum, the juvenile or family court. The juvenile justice system can protect the child from further abuse by ordering support services and treatment for the family, by monitoring the child's situation, and by removing the child from home when necessary.[8] Juvenile court proceedings also may be less traumatic to the child, for several reasons. Closing of the courtroom, appointment of a guardian ad litem, and a less vigorous standard of proof all help to alleviate some of the difficulty inherent in a child's participation in court. It must be recalled, however, that the goal of juvenile court proceedings is to protect the child from further abuse, not to prosecute the offender. Just as the criminal court has no jurisdiction over the fate of the child, the juvenile court cannot fine or sentence the adult offender (though in some cases involving children, the family court can order the parent into treatment or bar him from living in the home). Today, with a growing societal concern over abused children, it has become increasingly common to prosecute intrafamily cases in criminal court. Indeed, in some circumstances, a child may have to participate in both criminal and juvenile court proceedings.

Children as Witnesses

Some studies have found that child sex victims who participate in judicial proceedings suffer more deleterious effects and psychological harm than children who do not go to court.[9] There is other evidence, though, that some children appear unharmed by the criminal justice system. What exactly is it about the criminal justice system that may be difficult or troublesome? In each of the four jurisdictions we visited, we posed that question to the professionals who work with child victims in counseling or in the courtroom. Most respondents stressed that children's abilities to cope with the judicial process varied a great deal, depending on age and circumstances. There were many common themes, however. The most frequently mentioned fear was facing the defendant. That experience is frightening for most adults, but to a child who does not understand the reason for confrontation, the anticipation and

experience of being in close proximity to the defendant can be overwhelming. This fear was mentioned by virtually all respondents, including police, social workers, advocates, therapists, doctors, and judges.

Children are also overwhelmed by certain physical attributes of the courtroom. Many interview respondents mentioned that the large size of the witness chair can be very intimidating to a child. As one therapist described the child's sense of helplessness, "She can't even run away because her feet don't touch the ground." Microphones may be pointed at the child and the judge's chair may be raised above the witness chair, increasing the child's feelings of being small and helpless. Small children at the dinner table are given special chairs or telephone books to help them feel comfortable, but, until recently, no such accommodations were made in the courtroom.

The anxiety felt by children is not confined to the trial itself nor to the act of testifying. Having to repeat their stories so many times was also reported to be difficult and confusing to children. Because they do not understand the different roles and obligations of all the people who interview them, children do not understand why they must tell their stories for police, social workers, doctors, prosecutors, and, ultimately, the court. As one child said to a prosecutor, "Can't I just tell you?" While this is simply exasperating for some children, it causes others to relive the traumatic event repeatedly. Still others feel partially relieved of some of the trauma upon telling the story the first time and proceed to block out important details in subsequent sessions. The problem is exacerbated when the case is prolonged by seemingly endless continuances. In addition, every interview adds another person who may be insensitive to the child's situation and who may unwittingly cause additional harm.

Other characteristics of the criminal justice system that were reported to be disturbing or frightening to children include: cross-examination, the audience, being removed from home, the judge, retaliation or retribution by the defendant, general fear of the unknown, and the jury. Again, we must consider the status and viewpoint of the children being asked to testify. Although cross-examination can be anxiety producing for anyone, children do not understand its purpose or why someone is trying to discredit them. A child is no match for a defense attorney.

Some of children's reactions to the criminal justice system may seem inappropriate or illogical to adults. For example, an interview with the child may begin by requesting identifying information, i.e., name, age, school, grade, home address. But a young child may misinterpret these initial questions to mean he or she is under suspicion or arrest.[10] Likewise, adults who testify do not usually focus their fears towards the judge. While some children may feel protected by the presence of the judge, others see the judge as a big stranger in a dark, scary robe who yells at people in the courtroom and sits towering above the witness stand. One therapist told of a child witness who was afraid that the judge would hit her with the gavel, which she referred to as a hammer. Children perceive the judge's power to punish and may not understand that they are not the object of that punishment.

In their article on child witnesses to homicide, Robert Pynoos and Spencer Eth provide several examples of how inappropriate expectations can obstruct the child's ability to comply with the judicial process. The following description of a competency voir dire for a child whose father was accused of killing her mother is illustrative:

> Four-year-old Julie was not prepared for the sight of her father, the defendant, whom she had not seen in over six months, dressed in prison garb. On her way to the stand, she walked over and gave him a big hug. Without explanation to the child, the judge suddenly excused the jury who got up and left. He would not allow a trusted adult to sit with the child on the witness stand, but left her to sit in a witness chair obviously oversized for her. Once seated, she placed both hands over her mouth. The district attorney began the examination by showing her a coloring book; she shrugged silently, and the judge looked annoyed. The district attorney then asked her if she was a girl or a boy, and she fidgeted shyly. The judge interrupted by stating, "It doesn't appear to the court that she can qualify." He then abruptly dismissed her. Without her testimony, the father was acquitted and Julie was returned to his care.[11]

This child was not even given an opportunity to tell the judge and jury her story, resulting in a serious miscarriage of justice.

This was not an isolated incident. While there are no firm statistics, "The inability of young sexual assault victims to testify as effectively as adults and to confront their perpetrators results in failure to provide justice for them in many cases."[12]

* * *

The testimony of a child victim or witness can be critical to the prosecution. If children are treated insensitively in the pretrial period, the quality of their participation in the adjudication process is likely to suffer, thereby threatening the outcome of the case. To the extent possible, those elements of the judicial process that create undue stress should be minimized, because serving the child's best interests will, in the long run, benefit the state as well.

As we will see, victim advocates and prosecutors across the country have experimented with a variety of measures intended to alleviate the stress on child witnesses and thereby elicit more effective testimony. Different children may require different techniques; many can testify successfully without dramatic interventions. Even in the absence of explicit statutory authority or controlling case law, there is much that can be done to assist child victims in their pursuit of justice.

FOOTNOTES

1. David Lloyd, Attorney, Child Protection Center--Special Unit, Children's Hospital National Medical Center, Washington, D.C., Testimony before the President's Task Force on Victims of Crime, Final Report, December 1982, p. 51.

2. Robert Pynoos and Spencer Eth, "The Child Witness to Homicide," Journal of Social Issues, Vol. 40 (1984): 98.

3. Lucy Berliner and Mary Kay Barbieri, "The Testimony of the Child Victim of Sexual Assault," Journal of Social Issues, Vol. 40 (1984): 132.

4. R. Heifer, "The Epidemiology of Child Abuse and Neglect," Pediatric Annals, Vol. 10 (October 1984): 745-51, and S. Katz and M. Mazur, Understanding the Rape Victim (New York: John Wiley and Sons, Inc., 1979).

5. Rayline A. Devine, "Sexual Abuse of Children: An Overview of the Problem," in U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect, Sexual Abuse of Children, Selected Readings (Washington, D.C.: Government Printing Office, November 1980), pp. 3-6.

6. Edward H. Weiss and Regina F. Berg, "Child Psychiatry and the Law; Child Victims of Sexual Assault--Impact of Court Procedures," Journal of the American Academy of Child Psychiatry, Vol. 21 (1982): 513-518; and Lucy Berliner and Doris Stevens, "Advocating for Sexually Abused Children in the Criminal Justice System," in Sexual Abuse of Children, Selected Readings, supra, note 5 at pp. 47-50.

7. David Libai, "The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System," Wayne Law Review, Vol. 15 (1969): 977-1032.

8. Howard A. Davidson and Josephine Bulkley, Child Sexual Abuse--Legal Issues and Approaches (Washington, D.C.: American Bar Association, 1980), p. 6.

9. Katz and Mazur, supra, note 4 at p. 200, citing Wells, 1961; Reifer, 1958; Gibbens and Prince, 1964; DeFrancis, 1969; Henriques, 1961.

10. Pynoos and Eth, supra, note 2 at p. 98.

11. Ibid., pp. 100-101.

12. Bruce Woodling, "Diagnosis for Child Molestation," Paper presented at Protecting Our Children: The Fight Against Molestation, A National Symposium, Washington, D.C., October 3, 1984.

PART II

INNOVATIVE PRACTICES:
LEGAL ISSUES AND PRACTICAL CONCERNS

STATUTORY AND PROCEDURAL REFORMS

Public outrage and intense media coverage of child sexual abuse have prompted a flurry of proposals for reform in the way these cases are handled by the child protection and criminal justice systems. Many of these proposals have been the subject of bills introduced in state legislatures. Increasingly, alternative procedures for child victims are being given the force of statutory authority.

Exhibit 1 analyzes key provisions of relevant statutes that had been enacted as of the end of 1984. (Laws in this area are changing very rapidly and it is likely that some more recent changes are, due to time restraints, not included.) Individual state abbreviations appear across the top; down the left column are the subjects of the pertinent legislation and, under each, their important provisions. For ease of analysis, the reform measures are listed in two categories: (1) those seeking to alleviate the perceived trauma of giving live, in-court testimony; and (2) those authorizing mechanical interventions to obtain the child's testimony. The extensive footnotes to the chart should be analyzed alongside it, since they provide important clarifications or elaborations of the chart's contents. Exhibit 2 lists full citations for the statutes analyzed.

The legal issues and practical concerns surrounding these innovations are explored in the chapters that follow. Readers may wish to refer back to the statutory chart as needed, either to compare specific provisions of a particular type of statute, or to examine the extent to which a given state has adopted alternative techniques for child victims.

In addition to the provisions presented in the statutory chart, states have enacted other laws designed to assist the child victim in

sexual abuse cases. In some instances, these provisions exist in only one or two states. Other statutory provisions examined in this report include:

- Laws permitting child witnesses to have a supportive person present during their testimony, and offering the services of the court to explain the proceedings to the child, assist the family and child, and advise the court and prosecutor.

- Laws directing law enforcement, social service agencies, and prosecutors to conduct a joint investigation in each child sexual abuse case, using a single trained interviewer.

- Laws addressing scheduling of the trial, which give precedence to cases where the victim is a minor or to sexual offense cases.

It is important to note that many jurisdictions have introduced these and other innovations without benefit of enabling legislation. The latter chapters in Part II discuss these innovations as well.

Exhibit 1
Statutory Provisions Relevant to Child Witnesses in Sexual Abuse Cases*

	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY
LIVE TESTIMONY																																																				
Competency																														C.1																							
• child < 14: court determines																																																				
• child < 10: court determines			S			S,2							S		S			S,3					S	S,4		S,2							S,3			S,R					C.1	C.1					S			S		S
• child competent if understands oath	S,R	R							C		S	S																																		R						
• competent if understands oath					R		C							C		S,R	S	S		R		S					R				R			R										S			R				
• every person competent			R	S		R		R		S											S		R		S			S	S		S	R			R	S	S	S			S					R		S	R
Abused Child Hearsay Exception																																																			
• child's age (in years)			<10			<15								<13	<10		M							<10																					<10		M		<10			
• court finds reliable																	S							S																					S		S		S			
• child testifies				S			S							S	S									S																					S		S		S			
• child unavailable, statement corroborated				S			S								S		S							S																					S		S		S			
• notice of introduction				S			S								S									S																					S				S			
Exclusion of Spectators from Courtroom																																																				
• victim/witness age (in years)	any	≤16	any		any					<16	any			<13				≤15			<18	any	<18	any		any			<16		any	any	any										M			any			any		
• during testimony only		S			6					S				S				S			9								10			S											S						6		
• public transcript provided		S	S		S																								S																						
• media exception			S							S				S																													S								
• family, guardian, moral support exceptions		S			S					S									S																															S		
MECHANICAL TESTIMONY																																																			
Videotaped Testimony Admissible																																																			
• child's age (in years)		≤16	<15	<17	≤15	<15				<16								≤12		<14													<13	≤12			≤12						≤15		≤12				<18	
• defendant's presence specified		S	S	S		S				S								9		S						S						S			S								9					S		
• opportunity for cross-examination specified		S		S		10														S						10						S			S												S		
• court findings required (footnote)				11	12	13				14										15												16	17										18						19		
• court findings include unavailability					S	S																																							S							
• government may call child to testify				S														NO														NO				NO								NO					S		
• other (footnote)		20			21															22							23					24	25										21								
Closed Circuit Testimony Available																																																				
• child's age (in years)																		≤12	<14																			≤12								≤12							
• defendant present, but child cannot hear or see																		S	S																			S								S							
• attorneys present																		S	S																			S								S							
Abused Child Videotape/Film Hearsay Exception																																																				
• child's age (in years)																		≤12	≤14																											≤12							
• no attorneys present at taping																		S	S																											S							
• interviewer/child available to testify																		S	S																											S							

SOURCE: Statutes were provided by state governments in the fall of 1984.
*Except for age limits, all numbers refer to footnotes on following page.
See Exhibit 2 for statutory citations and a brief description of related laws *not* included on the chart.

KEY S = Statute (includes codified rules) C = Case law only
R = Rule of Evidence (not codified) M = Minor; child

Exhibit 1 continued

Footnotes to Chart

1. State most likely uses "14-year-old" common law standard.
2. Exception: A child victim of a sexual offense is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding involving the alleged offense. Trier of fact is to determine the weight and credibility to be given to the testimony.
3. Child under 12 years may not testify under oath unless court is satisfied that child understands the nature of an oath.
4. Exception for sexual abuse cases repealed. New language reads: "A child describing any act of sexual contact or penetration performed on or with the child by another may use language appropriate for a child of that age."
5. Corroboration is *not* required
6. This provision applies to the preliminary hearing.
7. This provision provides for in camera testimony.
8. Exception for a reasonable but limited number of members of the public.
9. Defendant present, but the court to ensure child cannot hear or see defendant.
10. Testimony to be taken under the Rules of Evidence.
11. Court order "for good cause shown."
12. Court finding "that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable..."
13. Upon application, court to make preliminary finding whether "the victim is likely to be medically unavailable or otherwise unavailable..."; at trial, court to find whether, "further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable..."
14. Court finding that, "there is substantial likelihood that such victim or witness would suffer severe emotional or mental distress if required to testify in open court."
15. Court "expressly finds that the emotional or psychological well-being of the person would be substantially impaired if the person were to testify at trial."
16. Court Rule. Court order upon, "Showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm." (Statute. Court order "for good cause shown.")
17. For a child witness 12 years old or under, testimony may be videotaped *without* court findings. For a witness greater than 12 years old, court must find the witness "is likely to suffer severe emotional or mental distress if required to testify in person..."
18. Court finding that "further testimony would cause the victim emotional trauma, or that the victim is otherwise unavailable ... or that such testimony would ... be substantially detrimental to the well-being of the victim..."
19. Court order where "there is a substantial likelihood that the child will otherwise suffer emotional or mental strain."
20. The videotapes are listed as an exception to hearsay in R. Evid. R. 804.
21. Testimony to be videotaped at preliminary hearing.
22. Stenographical testimony or other court approved means also available. Videotapes are specified in the videotape law as an exception to hearsay.
23. Victim in prosecutions for sexual intercourse without consent if victim is less than 16 years; deviate sexual conduct, incest (no age specified).
24. Videotapes are specified in the videotape law as an exception to hearsay.
25. Videotape law applies to testimony presented to the Grand Jury.

Exhibit 2

Statutory Citations for Selected Issues in Child Witness Testimony

Competency

Ala. Code § 12-21-165;
Ariz. Rev. Stat. Ann. § 12-2202 (controlling);
Ark. Rev. Stat. Ann. § 28-1001;
Cal. R. Evid. R. 701;
Colo. Rev. Stat. § 13-90-106(1)(b)(controlling);
Fla. Stat. § 90.601;
Ga. Code §§ 38-1607, 1610;
Hawaii Rev. Stat. § 621-16;
Idaho Code § 9-202;
Ind. Code § 34-1-14-5 (applied to criminal matters via § 35-37-4-1; § 35-1-31-3);
Iowa Code § 622.1;
Kan. Stat. Ann. § 60-417;
Ky. Rev. Stat. § 421.200;
La. Rev. Stat. Ann. § 15:469;
Md. Cts. & Jud. Proc. Code Ann. § 9-101;
Mass. Gen. Laws. Ann. ch. 233, § 20;
Mich. Stat. Ann. § 27A.2163;
Minn. Stat. § 595.02 (l)(f);
Miss. Code Ann. § 13-1-3;
Mo. Rev. Stat. § 491.060(2);
Neb. Rev. Stat. § 27-601;
Nev. Rev. Stat. § 50.015;
N.J. Rev. Stat. § 2A:81-1 and R. Evid. R. 17;
N.Y. Crim. Proc. Law § 60.20 (Consol.);
Ohio Rev. Code Ann. § 2317.01;
Okla. Stat. tit. 12, § 2601;
Or. Rev. Stat. § 40.310;
Pa. Stat. Ann tit. 42, § 5911 (Purdon);
S.D. Codified Laws Ann. § 19-14-1;
Tenn. Code Ann. § 24-1-101;
Utah Code Ann. §§ 78-24-2, 76-5-410;
Wash. Rev. Code § 5.60.050;
Wis. Stat. § 906.01;
Wyo. Stat. § 1-138.

Some of the above are codified versions of R.EVID.R.601. In addition, R.EVID.R.601 is found separately for the following states: Alabama, Alaska, Arizona, Colorado, Delaware, Iowa, Maine, Michigan, Montana, New Mexico, North Carolina, North Dakota, Ohio, Texas, Vermont, Washington, Wyoming.

Abused Child Hearsay Exceptions

Ariz. Rev. Stat. § 13-1416 (1984);
Colo. Rev. Stat. § 18-3-411 (3);
Ill. Rev. Stat. ch. 38, para. 115-10 (1983);
Ind. Code § 35-37-4-6 (1984);
Kan. Stat. Ann. § 60-460(dd) (1982);
Minn. Stat. § 595.02(3) (1984);
S.D. Codified Laws Ann. § 19-16-38 (1984);
Utah Code Ann. § 76-5-411 (1983);
Wash. Rev. Code § 9A.44.120 (1982).

Related provisions: Some states permit the use of certain out-of-court statements in a criminal prosecution if the witness is available to testify. See, for example, Del. Code Ann. tit. 11, § 3507 (1953) (statement can be consistent or inconsistent)

Exclusion of Spectators From Courtroom

Ala. Code § 12-21-202 (1940);
Alaska Stat. § 12.45.048 (1982);
Ariz. R. Cr. P. R. 9.3(c) (1973);
Cal. Penal Code § 868.7(a) (1983);
Fla. Stat. § 918.16 (1977);
Ga. Code § 17-8-53 (1933);
Ill. Rev. Stat. ch. 38, para. 115-11 (1983);
La. Rev. Stat. Ann. § 15:469.1 (1981);
Mass. Gen. Laws Ann. ch. 278, §§ 16A (1923), 16C (1978);
Mich. Comp. Laws § 750.520;
Minn. Stat. § 631.045 (1982);
Miss. Const. art. III, § 26;
Mont. Code Ann. § 3-1-313 (1977);
N.H. Rev. Stat. Ann. § 632-A: 8 (1979);
N.Y. Jud. Law § 4 (1968);
N.C. Gen. Stat. § 15-166 (1981);
N.D. Cent. Code § 27-01-02 (1974);
S.D. Codified Laws Ann. § 23A-24-6 (1983);
Vt. Stat. Ann. tit. 12, § 1901 (1947);
Wis. Stat. § 970.03(4) (1979).

Related provision: Utah Code Ann. § 78-7-4 (1953).Utah's law authorizing the closure of the courtroom in an action of "..., seduction,..., rape, or assault with intent to commit rape," has been construed to apply only in *civil* actions to avoid conflict with the Constitution.

Videotaped Testimony Admissible

Alaska Stat. § 12.45.047 (1982);
Ariz. Rev. Stat. Ann. § 12-2311 (1978);
Ark. Stat. Ann. §§ 43-2035 to 43-2037 (1981, 1983);
Cal. Penal Code § 1346 (1983);
Colo. Rev. Stat. § 18-3-413;
Fla. Stat. § 918.17 (1984);
Ky. Rev. Stat. § 421.350 (1984);
Me. Rev. Stat. Ann. tit. 15, § 1205 (1983);
Mont. Code Ann. §§ 46-15-401 to 46-15-403 (1977);
Okla. Stat. Ann. tit. 22, § 753 (1984);
N.M. R. Cr. P.R. 29.1 (1980) (based on N.M. Stat. Ann. §30-9-17 (1978));
S.D. Codified Laws Ann. § 23A-12-9 (1983);
Tex. Code Crim. Proc. Ann. art. 38.071 (1983);
Wis Stat. § 967.04(7) (1983).

Related provision: Iowa Code § 232.96 applies to petition alleging a child in "need of assistance" in juvenile proceedings, *not* criminal prosecutions.

Related provisions: State law sometimes permits a deposition in sexual assault cases to be used in lieu of live testimony *if* the accused consents. See, for example, Va. Code § 18.2-67 (law does *not* specify videotape).

Closed Circuit Testimony Available

Ky. Rev. Stat. § 421.350(3) (1984);
La. Rev. Stat. Ann. § 15:250 (1984);
Okla. Stat. Ann. tit. 22, § 753 (1984);
Tex. Code Crim. Proc. Ann. art 38.071(3) (1983).

Abused Child Videotape/Film Hearsay Exception

Ky. Rev. Stat. § 421.350(1) and (2) (1984);
La. Rev. Stat. Ann. §§ 15:440.1 to 15:440.6 (1984);
Tex. Code Crim. Proc. Ann. art. 38.071z)1) and (2) (1983).

III. COMPETENCY OF CHILD WITNESSES

As Professor Irving Prager at California's University of La Verne College of Law has noted, competency hurdles have been "the No. 1 legal rule preventing successful prosecution of child-molestation cases."[1] Historically, individuals could be considered incompetent to testify for reasons ranging from age to religious beliefs and marital relation to the offender.[2] Since 1974, with the enactment of the Federal Rules of Evidence and the subsequent adoption of the Uniform Rules of Evidence in many states, there has been a trend away from competency criteria and, in particular, the common law rule establishing a presumption of competency only for children over the age of 14 years. The more liberal Federal and Uniform Rules allow children to testify and permit the trier of fact to determine the weight and credibility of the testimony. Widespread adoption of these rules has been recommended by the American Bar Association's National Legal Resource Center for Child Advocacy and Protection.[3]

State competency standards may be found in state laws, court rules of evidence, or codified rules of evidence. In order to assess the current status of children as witnesses, we analyzed each state's competency provisions and developed the following typology:

1) Five states lack specific statutes or court rules regarding children's competency, but case law suggests that they most likely use the common law standard, which holds that a child above the age of 14 is presumed competent.

2) In thirteen states a child above the age of 10 is presumed competent. In two of these states, a child under 12 must show an understanding of the oath.

3) Five states stipulate that a child is competent to testify if he or she understands the nature and obligation of the oath, or, in some states, understands the duty of the witness to tell the truth. Case law would also place the District of Columbia in this category.

4) Thirteen states presume that anyone is competent if he or she understands the oath or the duty to tell the truth, regardless of age.

5) Twenty states dictate that every person is competent, the standard found in Federal Rule 601.

In addition, three of the states that normally apply the "10-year" standard (Colorado, Missouri, and Utah) have recognized the need for a child's testimony in sexual abuse cases by adopting an exception for these cases, but without liberalizing their overall competency provisions.

In some states, competency provisions are found in both the state's rules of evidence and in the state's statutes. On occasion, these provisions are conflicting. Where one of the provisions is clearly controlling, we have so noted in the footnotes to the chart, but in a few of the states, the controlling provision was not readily apparent. Another important point to note is that some states, while adopting the Federal Rule 601 standard stating that "every person is competent," have also added, "except as otherwise provided in these rules by statute." In a few of these states, we could not identify any statutory provision which restricted the rule, so the chart may not fully reflect the competency standards in this respect.

The test of a child's competency derives from the landmark U.S. Supreme Court decision in Wheeler v. United States, 159 U.S. 523 (1895), in which the question of a child's competency was found to:

> depend on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former.

In the ensuing years, the courts have set forth four dimensions that are used to measure a child's competency to testify:

1) present understanding of the difference between truth and falsity and an appreciation of the obligation or responsibility to speak the truth;

2) mental capacity at the time of the occurrence in question to observe or receive accurate impressions of the occurrence;

3) memory sufficient to retain an independent recollection of the observations;

4) capacity truly to communicate or translate into words the memory of such observation and the capacity to understand simple questions about the occurrence.[4]

The remainder of this chapter discusses these dimensions in further detail and examines some of the current empirical research and courtroom procedure pertaining to the evaluation of a child's ability to testify.

Capacity for Truthfulness

The first of the requirements, understanding the difference between truth and falsity and the obligation to tell the truth, is perhaps the most emphasized in today's courts. Even states that have adopted liberal competency standards still require a minimal understanding of what it means to tell the truth. This requirement is further defined in more current case law as "an appreciation and consciousness of the duty to speak the truth" and a "sense of moral responsibility."[5] Children have historically been asked questions about church attendance and their belief in God to determine their knowledge of the difference between truth and a lie. The current trend, however, recognizes that these types

of questions may be irrelevant due to changes in attitudes and cultural emphasis on religion and church attendance.

For adults, the taking of the oath is considered adequate evidence that the witness knows the difference between truth and falsehood and is obligated to tell the truth. A child, on the other hand, may not understand the wording of the oath or the import of its recitation. Not understanding the language of the oath does not disqualify child witnesses, as there are many other ways to determine their capacity to testify truthfully. Judges with whom we spoke use a variety of lines of questioning in their voir dire of children. A judge in Orlando emphasized the importance of beginning one's discussion with a child witness in a friendly, comfortable manner around topics familiar to the child, then determining his or her understanding of truth with a simple question. He would ask the child if his pen was an apple and what would happen if he said it was an apple, etc. Similar lines of questioning are fairly common and generally accepted as giving adequate evidence of the child's understanding of truth.

Several researchers have shown, however, that moral behavior or telling the truth does not necessarily follow from an understanding of the difference between truth and falsehood. In children as well as adults, comprehending the oath and the repercussions of telling a lie does not guarantee honesty.[6]

Mental Capacity

Little is known about children's ability to receive just impressions of criminal events. This may be because mental capacity is difficult to evaluate without considering whether the child has sufficient memory and the capacity to relate events, the third and fourth requirements. Questioning that leads to an assessment of the other three requirements will likely answer the court's questions concerning the child's mental capacity. It is recognized, however, that questioning in this regard should be geared to the age of the child and remain centered around simple questions such as the child's age and where he or she goes to school.[7]

Memory

The third aspect of competency, memory sufficient to retain independent recollection, is a complex requirement. In fact, there are three issues involved: whether the child has the capacity to (1) recall events, (2) separate fact from fantasy, and (3) maintain those memories independently, without being influenced by others.

To date, laboratory research with young subjects has shown that children are, indeed, less skillful than adults in reproducing events using free recall.[8] For example, a young child is often hard-pressed to answer the question, "What did you do at school today?" Older children and adults could supply a descriptive narrative that becomes more detailed with the narrator's age. It is important to keep in mind, however, that children do not provide more incorrect information in response to open-ended questions, simply less information.[9] And, when asked specific questions, such as "Did you play outside?" or "Was your friend Johnny at school?", children have been found to be on a par with adults. Research on school-age children shows little difference between them and adults in short or long term retention of memory.[10] In a similar vein, school-age children generally perform as well as adults in identifying persons from pictures or live line-ups.[11] Both children and adults have been found to have more trouble recalling peripheral details about an event than the central event itself.[12] Differences in recall ability are more pronounced among younger children. Studies of three-year-olds, for example, found that they recalled less information, were more suggestible, answered fewer objective questions correctly, and were less able to identify a person they had seen.[13]

The research is less consistent in deciding the level of a child's susceptibility to leading questions. In one experiment, the researcher stood outside as the children played, then went to their classroom. He asked, "When you were...in the yard, a man came up to me, didn't he? You surely saw who it was. Write his name on your paper." Only seven of the 22 eight-year olds complied, until the experimenter asked, "Was it not Mr. M__?" Seventeen children said "yes," and later gave full descriptions of the man's appearance and attire, despite the fact that no one had approached the experimenter outside. This experiment was recounted by the researcher while serving as an expert witness in a murder case involving two child witnesses. The defendant was acquitted.[14] It is

important to note, however, that this study was reported in 1911 and is of dubious scientific value.

A recent laboratory experiment used subjects ranging from kindergarten to college age to compare the effects of leading questions on children and adults. The subjects met individually with the experimenter but were interrupted by a confederate, who berated the experimenter for about 15 seconds before leaving the room. The subjects were then asked to perform a series of tasks, among them answering a number of objective questions about the incident. Two of the questions were varied so that some subjects were queried in a "leading" manner, while other subjects received a non-leading form of the same question. ("Did the man slam the door as he closed it?" vs. "Did the man close the door as he left?") The children were no more easily swayed into incorrect answers than were the adults.[15] In fact, according to one psychologist, "We can get people to tell us that red lights are green, that curly hair is straight, that barns exist where there are none."[16]

In light of this evidence, it seems that the style of questioning could be more to blame for inaccurate testimony than the age of the witness. This becomes a problem with cases involving child witnesses more often, however, because of the fact that children are asked more leading questions in courts than adults.[17] Indeed, there are many jurisdictions where leading a child witness is permissible.[18] This practice, and the effect it has on accuracy of all testimony, needs more c ical examination.

What is considered children's tendency to confuse fact and fantasy has frequently been cited as reason to bar them from testifying or to discount their testimony, once given. This issue is of special concern when children testify about incidents of sexual abuse. Researchers in this field currently believe--although the evidence is still inconclusive--that children cannot, on their own, fabricate a detailed, sexually-explicit, credible story of a sexual assault unless they have actually experienced it.[19]

The research is summed up by Marin et al.:

> . . . even very young children can be credible eyewitnesses particularly when combined with findings that children are as capable as adults of answering objective questions and

> are no more easily swayed into incorrect answers by leading questions. It appears that children are no more likely than adults to fabricate incorrect responses, and that when their testimony is elicited through the use of appropriate cues, it is no less credible than that of adults.[20]

Communication

The final issue is whether the child can communicate the facts of a case. This problem is clearly more pertinent to younger children. It has been recognized that young children can communicate adequately if certain minor accommodations are made.[21] The most obvious is tailoring the questions to the child's level of language development--especially in sexual abuse cases, where children generally use nontechnical language to describe parts of the body. A second technique that has been helpful in this regard is the use of anatomically correct dolls, with which child witnesses reenact the abusive incident.

The guidelines for interviewing children presented in Chapter 2 and Appendix A can be instructive for assessing competency as well. In addition, if the child has established a rapport with the prosecutor, then the child should experience less anxiety and perform better on the witness stand. In fact, several researchers[22] have found that the accuracy and efficiency of recall abilities are reduced when the situation is perceived as being hostile. If the child is more at ease, the benefits will likely be twofold: the trier of fact will have a clear and accurate picture of the child's developmental level (and therefore competency), and the child is more likely to give accurate testimony.

As we have seen, studies suggest that on most tasks inherent in testifying, children can perform as well as adults. By the time child witnesses appear at trial, they have told their stories several times and demonstrated their viability as witnesses to the prosecutor's satisfaction. Indeed, prosecutors have a vested interest in screening their witnesses, since there is no advantage in presenting someone who cannot remember the incident or does not know the difference between the truth and a lie. If a child appears incompetent on the stand, chances are

that it is anxiety about the trial situation or the inappropriate nature of the competency exam that is rendering the child incompetent.

* * *

Many of the reasons children have historically been barred from testifying lack empirical support. A relationship between age and honesty has never been shown, and it may be fair to say that young children are incapable of fabricating truly credible descriptions of events outside of their experience. Since adults are at least as likely to lie or to report incorrect facts during testimony, it seems only logical that children be allowed to testify to the best of their ability, just as adults do. There seems to be no line of questioning that will determine definitively that a child (or adult, for that matter) is competent to testify. As Gail Goodman and Joseph Michelli note:

> Given our present knowledge, we have no reason to believe that their testimony is not valid and fair to the defendant as other kinds of courtroom evidence that must be weighed by judges and juries.[23]

Similarly, the Attorney General's Task Force on Family Violence urges:

> Because the victim is often the only witness to the crime, a child's testimony may be critical to the prosecution of the case. Children, regardless of their age, should be presumed to be competent to testify in court. A child's testimony should be allowed into evidence with credibility being determined by the jury.[24]

The bottom line in the competency question appears to be the common sense axiom that people--including children--are different. From this standpoint, age is a somewhat arbitrary discriminator of legal competency to testify in court. Adoption of the more liberal Federal and Uniform Rules of Evidence, which allow children to testify and permit the trier of fact to determine the weight and credibility of the testimony, would facilitate justice in cases involving children.

FOOTNOTES

1. Mary Ann Galante, "New War on Child Abuse," National Law Journal, June 25, 1984, p. 26.

2. Gail S. Goodman, "Children's Testimony in Historical Perspective," Journal of Social Issues, Vol. 40 (1984): 12.

3. National Legal Resource Center for Child Advocacy and Protection, Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases (Washington, D.C.: American Bar Association, 1982), p. 30.

4. Gary Melton, Josephine Bulkley and Donna Wulkan, "Competency of Children as Witnesses," in National Legal Resource Center for Child Advocacy and Protection, Child Sexual Abuse and the Law, ed. Josephine Bulkley (Washington, D.C.: American Bar Association, 1981), p. 127.

5. Laudermilk v. Carpenter, 457 P. 2d 1004, 1010 (Wash. 1969); Moser v. Moser, 143 N.W. 2d 369, 371 (S.D. 1968).

6. Supra, note 2 at p. 13.

7. Supra, note 3 at p. 129.

8. Gail S. Goodman and Joseph A. Michelli, "Would You Believe a Child Witness?" Psychology Today (November 1981): 84; and Barbara VanOss Marin, Deborah Lott Holmes, Mark Guth, and Paul Kovac, "The Potential of Children as Eyewitnesses," Law and Human Behavior, Vol. 3 (1979): 301.

9. Marin, et al., ibid. at p. 297.

10. Marcia K. Johnson and Mary Ann Foley, "Differentiating Fact from Fantasy: The Reliability of Children's Memory," Journal of Social Issues, Vol. 40 (1984): 33-50.

11. Marin, et al., supra, note 8 at p. 302; and Helen R. Dent and Geoffrey M. Stephenson, "Identification Evidence: Experimental Investigations of Factors Affecting the Reliability of Juvenile and Adult Witnesses," in Psychology, Law and Legal Processes (Atlantic Highlands, NJ: Humanities Press, 1970), pp. 195-206.

12. K.H. Marquis, J. Marshall and S. Oskamp, "Testimony Validity as a Function of Question Form, Atmosphere, and Item Difficulty," Journal of Applied Social Psychology, Vol. 2 (1972): 167-186.

13. Gail S. Goodman and R.S. Reed, "Age Differences in Eyewitness Testimony," manuscript submitted for publication, 1984.

14. J. Varendonck, "The Testimony of Children in a Famous Trial," translated by Cindy Hazan, Robert Hazan, and Gail S. Goodman, in Goodman, supra, note 2 at pp. 26-31.

15. Marin, et al., supra, note 8 at p. 304.

16. Elizabeth Loftus, quoted in Goodman and Michelli, supra, note 8 at p. 84.

17. Supra, note 3 at p. 138.

18. Ronald L. Cohen and Mary Anne Harnick, "The Susceptibility of Child Witnesses to Suggestion," Law and Human Behavior, Vol. 4 (1980): 201-215.

19. Gail S. Goodman, Personal Correspondence, March 24, 1985.

20. Marin, et al., supra, note 8, at p. 304.

21. Lucy Berliner and Doris Stevens, "Advocating for Sexually Abused Children in the Criminal Justice System," in U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect, Sexual Abuse of Children, Selected Readings (Washington, D.C.: Government Printing Office, November 1980), p. 49.

22. Helen E. Dent and Geoffrey M. Stephenson, "An Experimental Study of the Effectiveness of Different Techniques of Questioning Child Witnesses," British Journal of Social and Clinical Psychology (1979): 41, citing W. Stern, "The Psychology of Testimony," Journal of Abnormal and Social Psychology, Vol. 34 (1939): 3-20; E. Lord, "Experimentally Induced Variations in Rorschach Performance," Psychological Monographs, Vol. 64 (1950): 10; and C. Zimmerman and R.A. Bauer, "Effect of an Audience on What is Remembered," Public Opinion Quarterly, Vol. 20 (1956): 238-248.

23. Goodman and Michelli, supra, note 8 at p. 91.

24. Attorney General's Task Force on Family Violence, Final Report, September 1984, pp. 38-39.

IV. EXCLUSION OF SPECTATORS

Open trials are a mainstay of the American justice system. Historically, their main purpose is to prevent judicial misconduct and use of the legal system as an instrument of persecution. Yet, in certain cases, victim advocates have advanced several arguments for excluding general spectators from the courtroom audience. The strongest argument emphasizes the trauma potentially suffered by the victim when relating the details of a particularly sensitive crime before the public. In addition, victim advocates sometimes argue that public exposure may have a chilling effect on the willingness of future victims to report such offenses and cooperate with prosecution.

Despite the paucity of empirical findings to support these claims, at least 20 states[1] have acknowledged an interest in barring some portion of the audience from the courtroom during the testimony of a sexual abuse victim. Many of these laws are not new; Georgia's statute was enacted in 1933, Alabama's in 1940, and Vermont's in 1947. Also, many closure statutes are not limited to cases involving child sexual abuse victims; rather, they apply to cases involving certain specified sex offenses, or to cases involving vulgar or obscene language. Closure statutes in California, Michigan, and Wisconsin apply only to the preliminary hearing.

Some states specify certain exceptions to the excluded audience, as does Alaska:

> **Sec. 12.45.048. Exclusion of public from trial during testimony by young victims of sexual offenses . . .** (b) If the public is excluded from the trial under (a) of this section, the testimony given during the time the public is excluded shall be available to the public upon request within a

reasonable amount of time sufficient to allow preparation of a tape recording or transcript of the testimony.

(c) In this section "public" means all persons except
(1) the judge presiding over the trial;
(2) the members of the jury;
(3) the defendant and the attorney and an investigator for the defendant;
(4) the prosecuting attorney and an investigating officer for the state;
(5) the parents or legal guardians of the child;
(6) a guardian ad litem or attorney for the child;
(7) in the discretion of the court, an adult for whom the child has developed a significant emotional attachment who can provide emotional support for the child while the child testifies;
(8) court personnel, including those essential for taking the testimony.

Four states (Arizona, Florida, Illinois, and South Dakota) permit newspaper reporters and broadcasters among the excepted audience that is permitted to remain in the courtroom during the child's testimony. Other statutes are very generally worded to exclude everyone except persons necessary to the conduct of the trial, thereby excluding both the general public and the press. New Hampshire provides for the child victim's testimony to be taken in the judge's chambers. (According to one prosecutor we interviewed, children's testimony is not actually taken in camera; rather, the courtroom door is closed to exclude general spectators and the press.) Alaska, Arizona, California, and New Hampshire provide for public access to the child's testimony by making a transcript available.

At least two states have had constitutional challenges to their state statutes when the press and public were barred from the courtroom. In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980), the U.S. Supreme Court considered whether a trial court could exclude the public and the press during a criminal trial. The trial court in this case had closed the trial under a Virginia statute permitting trial closures at the sole discretion of the judge. The Supreme Court found the trial court's action to be unconstitutional, as it

violated the right of the public to open trials. In finding a violation of that right, the Court cited the fact that the trial judge made no findings to support closure, no inquiry into alternative solutions, no recognition of the constitutional right for the public and press to attend, and no suggestion that sequestration would not have protected the jurors from misinformation. Under these circumstances, the Court did not consider what counterveiling interests might be sufficient to reverse the presumption of an open trial.

In 1982, the U.S. Supreme Court examined a Massachusetts statute, construed by the Massachusetts Supreme Judicial Court to require judges to exclude the press and general public from the courtroom during the testimony of certain sex offense victims under the age of 18. (Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).) The Supreme Court found the mandatory closure interpretation unconstitutional, despite the fact that it was narrowly applied. In this case, the state attempted to justify closure on two grounds: 1) to protect minor victims of sex crimes from further trauma, and 2) to encourage such victims to come forward and testify. The Court found that the first interest is compelling, but it could be served by making the determination on a case-by-case basis. A mandatory rule is not justified, as not all victims will be traumatized by the spectators and press, and the test is the incremental injury suffered by testifying in the presence of the press and the general public. The Court found the second justification was speculative and open to serious question as a matter of logic and common sense.[2]

Interestingly, many of our interview respondents observed that the courtroom audience is not a major concern for most child victims. They also noted that there rarely is a general audience; as a result, existing closure statutes are seldom invoked. Extenuating circumstances in individual cases may call for exclusion of spectators, for example, where the defendant purposely fills the audience with individuals who support the defense and may intimidate the child victim. But, for the most part, when spectators are present, we were told, they can often be persuaded to leave voluntarily by simple request of the prosecutor.

Such tactics are not likely to be effective with the press, however. The Attorney General's Task Force on Family Violence has advo-

cated "carefully managed press coverage" of trials involving child victims:

> Court proceedings involving a child victim or witness must not become a media event. When a youngster is a juvenile offender, his name is withheld and the court proceedings are closed to the public. At a minimum, the same considerations should be given to the child victim.[3]

Our interviews with victim advocates suggest that the media's cooperation with requests to suppress identifying information has been variable. One respondent cited instances where the child's name was withheld but the parents were clearly identified. Elsewhere, the child was not identified by name, but photographs and film clips were prominently featured. Even if the press is excluded from the courtroom without violating the First Amendment, this measure alone does not eliminate the potential for intrusion into the victim's privacy.

* * *

There is, to date, no empirical support for contentions that children are traumatized by the presence of an audience during their testimony. Anecdotal evidence suggests that the courtroom audience is not a major concern for many children. To be sure, some children will indeed be humiliated by public exposure of their victimization. In such cases, courtroom spectators generally comply if the prosecutor asks them to leave. According to the Globe decision, formal closure may be available upon a proper showing of "incremental injury," taking into consideration the victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relations.[4]

Although trial closure can help to shield child victims from the presumed trauma of testifying in open court, it does little to protect them from public exposure by the media. Instead, media policymakers should respect the private dignity of these children by withholding any identifying information and by refraining from exploiting the potentially sensational nature of these crimes.

FOOTNOTES

1. Alabama, Alaska, Arizona, California, Florida, Georgia, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New York, North Carolina, North Dakota, South Dakota, Vermont, and Wisconsin.

2. For an analysis of the Globe opinion and its ramifications for future research on the vulnerabilities of child witnesses, see Gary B. Melton, "Child Witnesses and the First Amendment: A Psycholegal Dilemma," Journal of Social Issues, Vol. 40 (1984): 109-123.

3. Attorney General's Task Force on Family Violence, Final Report, September 1984, p. 40.

4. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

V. ATTEMPTS TO AVOID DIRECT CONFRONTATION

The Sixth Amendment to the U.S. Constitution guarantees all criminal defendants the right to confront their accusers. At the same time, fear of seeing the defendant is frequently mentioned as one of the most traumatic aspects of the criminal justice system for children. Theoretically, looking the defendant in the eye as one accuses him or her of a crime provides an acid test of the truth. But when the accuser is a child, the right of confrontation may offer a convenient means of intimidating the witness, resulting in serious, damaging effects on the child's testimony.

As early as 1969, David Libai called for the development of "children's courtrooms," in which defendants and spectators would observe the child's testimony from behind a one-way mirror. Defendants could communicate with their attorneys via headphones.[1] This recommendation was resurrected in 1982 by Jacqueline Parker,[2] and echoed in 1983 by the National Conference of the Judiciary on the Rights of Victims of Crime: "Judges . . . may consider . . . encouraging specially designed or equipped courtrooms to protect sensitive victims, provided that the right of confrontation is not abridged."[3] To date, concerns that the Sixth Amendment right could not be preserved in the children's courtroom have kept it from becoming reality. Even so, victim advocates and prosecutors have experimented with different ways to preserve the right of confrontation without actually requiring the child to face the defendant in court.

The Use of Closed Circuit Television

Perhaps the most radical of these new techniques is the use of closed circuit television to broadcast the child's live testimony from another room adjacent to the trial courtroom. At least four states

(Kentucky, Louisiana, Oklahoma, and Texas) statutorily authorize judges to allow physically or sexually abused children to testify via closed circuit television to the court and jury. These laws permit the attorneys and a support person to be present with the child. Additionally, the defendant and equipment operators can be present but the child cannot see or hear them. State courts without statutory authorization have also used or sought to use closed circuit television in trial sexual abuse cases. The growing popularity of this technique has raised some constitutional concerns.

Legal commentators have suggested that closed circuit testimony may violate the defendant's right to a fair trial under the Fourteenth Amendment, the defendant's right to a public trial, and/or the press and public's right to attend criminal trials. But the most serious constitutional concern has been that closed circuit testimony violates the defendant's Sixth Amendment right to confrontation of witnesses.

The primary means of protecting the right of confrontation is said to be cross-examination of witnesses. Use of closed circuit television does not jeopardize this protection, since defense counsel is free to cross-examine the child. The secondary confrontation protection is to have the witness testify before the accused. This raises the issue of whether the child must testify eye-to-eye with the defendant or whether the defendant need only view the child during the testimony. Where statutes on closed circuit testimony provide only for one-way telecast, some argue that the right to confrontation is jeopardized by closed circuit television. (The right is also germane to new hearsay exceptions and videotaped testimony, which are discussed later in this report.)

In Ohio v. Roberts, 448 U.S. 56 (1980), the U.S. Supreme Court considered whether the admission at trial of an unavailable witness' preliminary hearing testimony violated the defendant's right to confrontation. Basically, the Court established a two-pronged test to avoid violation of the confrontation clause when a hearsay statement is offered into evidence but the declarant does not testify at trial:

1) The witness must be found to be unavailable. This usually means the witness is incompetent, asserts a privilege, refuses to testify, claims lack of memory, is

ill, is dead, or is absent despite reasonable efforts to procure the witness.

2) If the witness is truly unavailable, then the evidence must either fall within "a firmly rooted hearsay exception" or there must be circumstantial guarantees of trustworthiness.

As noted above, the issue of confrontation arises in the context of closed circuit testimony primarily because, under the statutes enacted as of December 1984, the child cannot see the defendant while testifying. Some legal observers, having concluded that confrontation requires face-to-face testimony, find that the Roberts test must be met in order to use the closed circuit technique, because it addresses the conditions necessary to dispense with confrontation.

> The absence of face-to-face confrontation between the defendant and a child witness who has not been shown to be unavailable to testify in the accused's presence at trial is unconstitutional.[4]

To the extent that the courts in child sexual abuse cases will require a showing that the child is unavailable before authorizing a closed circuit telecast, unique problems will arise. Closed circuit testimony is often advocated because of a fear that forcing the child to testify in court will cause severe emotional damage, or because the child simply freezes on the stand. These reasons do not fall into the traditional definitions of unavailability. Still, some courts have accepted potential psychological injury as unavailability. (Moreover, some videotape laws explicitly permit a finding of unavailability based on potential severe trauma; see Chapter 6.)

A test of psychological unavailability is supported by some legal commentators.[5] Such a test might include the four factors set forth in Warren v. U.S., 436 A.2d 821 (D.C. Ct. App. 1981):

1) the probability of psychological injury as a result of testifying,

2) the degree of anticipated injury,

3) the expected duration of the injury, and

4) whether the expected psychological injury is substantially greater than the reaction of the average victim of rape, kidnapping or terrorist act.

Some courts considering closed circuit testimony have cited the Roberts decision for the proposition that competing interests may warrant dispensing with confrontation at trial. While these courts have not explicitly applied the Roberts test, they have carefully examined similar issues: the potential psychological injury to a child as a result of testifying in court, and whether the use of closed circuit television will enhance the accuracy of the child's testimony. For example, the New Jersey Supreme Court has permitted the use of one-way closed circuit television in a case of child sexual abuse, even in the absence of an enabling statute. (State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984).) There, a forensic psychiatrist had examined the child and testified as to the probable effect of her in-court testimony (which included "nightmares, depression, eating, sleeping, and school problems, behavioral difficulties, including 'acting out' and sexual promiscuity"). The expert further testified that avoiding an in-court appearance would improve the accuracy of the child's testimony. He stated that, while an adult testifying in a courtroom atmosphere is more likely to be truthful, the opposite is true of a child testifying against a relative in a sexual abuse case. A child will become fearful, guilty, anxious, and traumatized; these feelings tend to mitigate the truth and produce inaccurate testimony. Also testifying for the state were two prosecutors with extensive experience with child victims, and a technical expert who demonstrated the use of the proposed equipment for the court. In permitting the use of closed circuit television in this case, the New Jersey Supreme Court stipulated a number of conditions, reproduced in Appendix B to this report.

The California Court of Appeals recently rejected the use of closed circuit testimony in a child sexual abuse case because it found that the technique was a radical departure from established practice, beyond the scope of the trial court's inherent powers, and its use would

require statutory authorization. (Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal Rptr. 273 (1984).) However, the Court also emphasized the need to firmly establish the potential injury to the child before resorting to closed circuit testimony. The Hochheiser court concluded that,

> . . . before a child victim is excluded from testifying in the presence of the jury and the accused on the premise that he will suffer additional injury, the basis for such a premise must be established both in fact as well as in logic, and its dimensions must be spelled out in terms of its nature, degree and potential duration.

In this particular case, the testimony of the child's parents as to the child's emotional instability was held to be insufficient to demonstrate the need for closed circuit television.

Once the child is shown to be unavailable, testimony obtained via closed circuit television should be admissible under most circumstances because it possesses several "particularized guarantees of trustworthiness": the child will be testifying under oath; the child's demeanor will be visible to the trier of fact and the defendant; the child will be cross-examined by defense counsel.

One final issue may arise in those states where the state constitution explicitly requires "face-to-face" confrontation and the courts interpret the provision literally. Such a construction might foreclose one-way closed circuit telecasts entirely. Indeed, one Kentucky trial court has held that, since that state's closed circuit law specifies the child is not to see the defendant, the law impermissibly violates the defendant's right to "face-to-face" confrontation as contained in the Kentucky Constitution. This trial court decision is currently on appeal, where a key issue, according to the government, will be whether face-to-face confrontation encompasses only the defendant's view of the witness, or whether the witness must also be able to see the defendant. (Commonwealth v. Willis, No. 84-CR-346 (Fayette Cir. 1985).)

To avoid the issue of face-to-face confrontation, at least one court has used a two-way broadcast, whereby the defendant's image is projected to the child. (Florida v. Arencibia, No. 84-23154 (11 Jud. Cir. of Fla.

1985).) While this method might satisfy the constitutional concern, it is unclear as to how most children will react to the technique.

Finally, televised trial materials have been challenged on grounds that they threaten the defendant's right to a fair trial. Several commentators have argued that inherent properties of a televised (or videotaped) trial--its limited perspective, distortion of images, and similarity to television as an entertainment medium--detract seriously from the viewer's ability to grasp a complete and accurate picture of the witness' demeanor.[6] To test these claims, researchers conducted a series of studies--some in a laboratory setting, others using actual jurors who viewed live vs. videotaped, reenacted trials--and found "no evidence to indicate that the introduction of videotaped materials has any marked negative effect on courtroom communication between trial participants and jurors."[7] Indeed, jurors who watched videotaped trials retained more trial-related information than did jurors who saw live presentations. Color videotape, however, tended to enhance witness credibility, particularly for witnesses with strong presentational skills.[8]

Ad Hoc Techniques for Limiting Confrontation

In some instances, trial courts have permitted improvised measures designed to protect sensitive victims from the direct gaze of the defendant during their testimony. For example, in State v. Mannion, 57 P. 542 (Utah Sup. Ct. 1899), the witness had been seated with her back to the defendant, who was seated in a corner of the courtroom and could not see or hear the witness' testimony. This arrangement was found to abridge the defendant's right of confrontation. In contrast, the court in State v. Strable, 313 N.W. 2d 497 (Iowa 1981), held that the fact that the witness testified behind a blackboard was, at most, a harmless error under the circumstances of that case.

Enterprising prosecutors and victim advocates continue to seek ad hoc, yet unobtrusive ways to shield child victims from direct eye contact with defendants. Some prosecutors report using their own bodies to block the victim's view of the defendant during the direct examination. Others simply instruct children to look elsewhere while they testify, especially to look for a supportive family member or victim advocate in the courtroom audience. One victim advocate encourages children to tell the judge if the defendant is "making faces." Such instructions to a

child may not completely eradicate the fear of seeing the defendant in court, but at least they impart a small sense of control in an otherwise overpowering situation.

It is important to recall, too, that trial is not the only proceeding where a child witness may have to face the defendant. In many jurisdictions, it is customary for the defense to depose prosecution witnesses as part of discovery. Defendants cannot legally be barred from attending a deposition, although they may voluntarily waive their right to participate. In Des Moines, counselors and advocates claimed that depositions are far more traumatizing for children than trials, for several reasons. First, they take place in smaller rooms, thereby bringing the defendant into much closer physical proximity. Second, there is no judge or jury to monitor the behavior of the defendant or defense counsel. Prosecutors observed that, although they can stop the deposition at any time, doing so can be damaging to their case. Finally, in Des Moines, the child witness lacks even the protection of a support person; counselors and advocates generally are not permitted to attend the deposition. (Elsewhere, statutes expressly authorize the presence of a support person for the child during all court proceedings; this is discussed further in Chapter 9.)

* * *

According to one legal commentator, the right of confrontation "is so basic to due process that there are few conceivable ways in which confrontation can be preserved in criminal cases without subjecting the child victim to the stress of facing the defendant."[9] Whether the new technology of closed circuit television can indeed satisfy the Sixth Amendment guarantee of confrontation will only be answered after extensive litigation. Even if it does pass Constitutional muster, it seems evident that the technique will only be available in narrow circumstances.

FOOTNOTES

1. David Libai, "The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System," Wayne Law Review, Vol. 15 (1969): 977-1032.

2. Jacqueline Y. Parker, "Rights of Child Witnesses: Is the Court a Protector or Perpetrator?" New England Law Review (1981-1982): 643-717.

3. U.S. Department of Justice, National Institute of Justice, Statement of Recommended Judicial Practices, Adopted by the National Conference of the Judiciary on the Rights of Victims of Crime, Reno, Nevada, December 2, 1983.

4. Michael H. Graham, "Child Sex Abuse Prosecutions: Hearsay and Confrontation Clause Issues," in National Legal Resource Center for Child Advocacy and Protection, Papers from a National Policy Conference on Law Reform in Child Sexual Abuse Cases (Washington, D.C.: American Bar Association, forthcoming).

5. National Legal Resource Center for Child Advocacy and Protection, Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases, by Josephine Bulkley (Washington, D.C.: American Bar Association, forthcoming); Wallace J. Mlyniec, "Presence, Compulsory Process, and Pro Se Representation: Constitutional Ramifications Upon Evidentiary Innovation in Sex Abuse Cases," and Graham, "Child Sex Abuse Prosecutions," in Papers from a National Policy Conference, supra note 4.

6. James J. Armstrong, "The Criminal Videotape Trial: Serious Constitutional Questions," Oregon Law Review, Vol. 55 (1976): 567-585; S. Brakel, "Videotape in Trial Proceedings: A Technological Obsession," American Bar Association Journal, Vol. 61 (Aug. 1975).

7. Gerald R. Miller, "The Effects of Videotaped Trial Materials on Juror Responses," in Psychology and the Law, ed. Gordon Bermant, Charles Nemeth and Neil Vidmar (Lexington, MA: Lexington Books, 1976).

8. A similar phenomenon was noted by the Hochheiser court (161 Cal. App.3d 777, 208 Cal. Rptr. 273 (1984)), citing Miller and Fontes, "Real Versus Reel: What's the Verdict? The Effects of Videotaped Court Materials on Juror Response," Final Report, NSF-RANN Grant APR75-15815, Michigan State University, pp. 74-75.

9. Gary B. Melton, "Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings," in Child Sexual Abuse and the Law, ed. Josephine Bulkley (Washington, D.C.: American Bar Association, July 1981), 184-198.

VI. VIDEOTAPED DEPOSITIONS AND STATEMENTS

Victim advocates throughout the country have enthusiastically embraced the potential of videotaping technology as a means of reducing the trauma of child victims. It has been recommended as a substitute for live testimony by the Attorney General's Task Force on Family Violence,[1] and the National Conference of the Judiciary on the Rights of Victims of Crime has suggested that judges "consider . . . permitting the use of videotaped depositions in cases involving sensitive victims, providing that the right of confrontation is not abridged."[2] By December 1984, 15 states[3] had enacted some form of legislation permitting the introduction of videotaped statements or depositions at trial under certain conditions.

Videotape is not new to the criminal justice system. For at least a decade it has been used for several purposes, e.g., to preserve the testimony of a witness who is likely to be unavailable for trial, to demonstrate reenactments of accidents, and to record the reactions of alleged drunk drivers during behavioral sobriety tests. There are two ways in which videotape technology has been applied in child sexual abuse cases: (1) to capture the child's first formal statement, and (2) to record the child's testimony at a judicial proceeding apart from trial. Both applications are reviewed below, followed by a brief synopsis of legal and empirical questions surrounding the use of videotape technology in the courts.

Videotaping the Child's First Statement

The most common application of videotape technology in child sexual abuse cases is to capture the child's first formal statement, typically given to a law enforcement officer, protective services worker,

or treatment specialist. Our telephone interviews revealed that police and prosecutors in many jurisdictions rely frequently on videotape strictly as an investigative aid.

There are several reasons to videotape the child's first statement:

- The child's memory may fade over time.
- In intrafamilial cases, family members often pressure children to retract their stories, thereby sapping their strength and weakening their testimony as their cases progress.
- Videotaping can help to reduce the number of interviews children must give, thereby allowing them to get on with their lives and minimizing the prospect of testimony that is so well-rehearsed that it loses credibility.
- In states that permit hearsay evidence at the preliminary hearing or before the grand jury, the video could preclude the need for the child's live testimony at these proceedings.

Many prosecutors have observed an unanticipated, yet welcome side effect of videotaping a child's early statement: it tends to prompt a guilty plea when viewed by defendants and their attorneys.[4] Apparently, the defense reasons that a child who performs well on videotape will perform equally well in court--an assumption that has not been empirically tested.

In three states (Texas, Kentucky, and Louisiana), there is additional incentive to videotape the child's initial statement. By statute, the videotape may be introduced at trial, provided that (1) the videotape was made at the child's first statement; (2) the child was questioned by a non-attorney; and (3) both the interviewer and child are available for cross-examination.

In spite of the advantage of admitting the taped statement at trial, these laws in general (and the Texas law, specifically), have been criticized as constitutionally infirm. First, critics assert that the laws

permit the defendant to be tried on an ex parte affidavit, since the prosecution does not have to examine the witness to introduce the statement. They argue that the Confrontation Clause of the Constitution requires the prosecution to call available witnesses when introducing their statements, and then offer the defense the opportunity to cross examine. Second, although the laws provide that the defendant may call the child to testify, critics point out that the constitutional protections of the Compulsory Process Clause permit the defendant to call "witnesses in his favor," while these statutes would have the defendant call a witness against him.[5] In fact, in a number of Texas cases where the videotape has been used at trial, the defense has not called the child to testify, apparently for fear that jurors will construe such an action as unnecessarily harmful for the child,[6] or that the child will relate the same story again and thus bolster the evidence against him. The Texas law has been upheld on appeal, but the appellate court adhered strictly to the wording of the statute and did not go into constitutional questions.[7] (In Appendix C are guidelines for videotaping a child victim's statement to comply with the Texas statute.)

Even in states lacking this type of legislation, it may be possible to introduce a videotaped statement under existing rules of evidence or case law precedent, in certain situations. One prosecutor suggested to us, for example, that if a child takes the witness stand and denies the entire incident, it may be possible to introduce the videotape as a prior inconsistent statement, along with expert testimony to explain the child's behavior. (However, in most jurisdictions, a prior inconsistent statement can only be introduced for impeachment purposes, not as proof of the truth of the prior statement.[8]) And, in Minnesota, where there is no videotape legislation, prosecutors have succeeded in introducing a videotape of a child's "extrajudicial" statement under a rule of evidence (Minn. R. Evid. 801(d)(1)(B)) that admits prior consistent statements to rebut charges of fabrication. (Hennepin Co. v. Sullivan, Minn. Court of Appeals, CX-84-807, January 8, 1985.)

Unfortunately, there are a number of disadvantages associated with extrajudicial videotaped statements. First, introducing the videotaped statement does not protect the child from the presumed trauma of courtroom testimony, since by statute the child still must be available for cross-examination at trial. Second, children's interviews are seldom straightforward, and the child may volunteer information that is detri-

mental to the case and cannot be excised. For example, we viewed a videotape of a three-year-old who wavered on the question of whether she had a dog. An astute defense attorney could exploit the child's uncertainty on this apparently simple matter to discredit her entire statement. Indeed, the child may even deny the allegation at the time the videotape is made.

Perhaps the most critical aspect of the videotaped statement is the expertise of the interviewer. As was discussed in earlier chapters, it is often difficult to obtain a clear story from a child without some degree of prompting. Moreover, if the child has been pressured or threatened into silence, the interviewer may feel compelled to reinforce the child as the story unfolds. These questioning techniques, though perfectly reasonable and even beneficial in a therapeutic milieu, are dangerous in a court of law. Entire videotapes have been found inadmissible where leading questions were overused.[9]

Even if videotapes are not intended for use as evidence at trial, their mere existence may pose a threat to the victim's privacy. Confidentiality cannot be guaranteed and videotape excerpts have reportedly appeared on media broadcasts. The potential for videotapes to become public property has prompted a number of mental health professionals to abandon them, even for therapeutic purposes. (This same problem arises with videotaped depositions, discussed in the next section. However, statutes in Arkansas, California, Montana, and New Mexico make the videotape subject to a protective order for the purpose of protecting the victim's privacy.)

Ultimately, from a prosecutor's perspective, videotaping a child's first statement offers a chance to shore up a weak case where the child performs poorly on the stand, whether because of pressures to retract, overpreparation, or inability to withstand cross-examination. In Texas, these extrajudicial videotapes have reportedly enabled prosecution of some cases that otherwise would have been dismissed. They have had little discernible effect on case outcome. In sum,

> The tape is a valuable tool to protect the child victim and enhance the prospect of successful prosecution, but it does not overwhelm juries and stampede them in a rush to judgment.[10]

Videotaped Testimony

At least 14 states provide for the introduction at trial of videotaped testimony taken either at the preliminary hearing or at a formal deposition. (This includes Kentucky and Texas; Louisiana provides only for the videotaped extrajudicial statement.) These laws are predicated on an assumption that testifying at trial is traumatic for the child. Proceeding from this assumption, videotape statutes in Kentucky, New Mexico, Oklahoma, and Texas explicitly prohibit the government from calling the child to testify at trial. In contrast, the Arkansas and Wisconsin statutes explicitly reserve this right for the government. In Arkansas, an emergency act passed in 1983 added the following provision to the existing videotape statute:

> **AR 43-2036** . . . neither the presentation nor the preparation of such videotaped deposition shall preclude the prosecutor's calling the minor victim to testify at trial if that is necessary to serve the interests of justice.

In this amendment, Arkansas legislators acknowledged the need to protect the child from testifying in open court, yet "recognized that in some limited circumstances, the interest in protecting the child is outweighed by the interest in convicting the guilty defendant." (Acts 1983, No. 407, Section 3)

Twelve states explicitly require the defendant to be present at the time of the videotaping, although three of those states (Kentucky, Oklahoma, and Texas) specify that the child must not be able to see or hear the defendant. (However, as was noted in Chapter 5, the constitutionality of the Kentucky law is currently being litigated.[11]) Seven states stipulate that the defendant be provided a full opportunity to cross-examine the child; two states imply the opportunity for cross-examination; and two more states require the child's testimony to be taken under the Rules of Evidence. Only Wisconsin expressly provides for the situation in which a defendant was not present at the videotaping, by requiring that the child must testify at trial.

Eight states permit the introduction of videotaped testimony in lieu of live testimony only if the court finds that testifying will be

traumatizing or that the witness is medically or otherwise unavailable. The Arkansas law authorizes videotaping for good cause shown.

Legal Questions

The legal questions surrounding the use of videotaped testimony parallel those discussed in Chapter 5 in the context of closed circuit television.[12] Several states (including Arkansas, Maine, and New Mexico) explicitly identify videotaped testimony as an allowable exception to hearsay in their laws or rules of evidence, but most states treat the use of videotape as the "functional equivalent" of in-court testimony.[13] Yet, the use of videotaped testimony may violate a defendant's right to confront witnesses. Thus, some legal commentators have suggested that its introduction should conform to the requirements of Ohio v. Roberts, 448 U.S. 56 (1980), discussed in Chapter 5, before the child's videotaped testimony is admitted in lieu of a live appearance. To do this, the child must be found unavailable to testify, and the evidence must demonstrate "particularized guarantees of trustworthiness." (It is unlikely that a videotaped deposition would meet the firmly rooted hearsay standard, although it is possible that in states with an explicit hearsay exception for videotape, some may argue otherwise.)

Deposing the child before trial commences raises the dilemma of showing that a child who was available to testify on videotape is, nonetheless, unavailable to testify at trial.[14] This may pose a particular problem where the ground for the child's unavailability at trial will be psychological, if the child has already successfully testified for the taping in front of the defendant. To avoid this problem, the deposition might not be taken until after the trial has begun and the child has been found unavailable. This approach also removes the possibility of a defense assertion that new information arising between the videotaped proceeding and the actual trial necessitates calling the child for further cross-examination. At the same time, postponing the taping forecloses one of the benefits of videotaping--permitting the child to exit the system as early as possible.

Videotaped testimony, like that obtained via closed circuit television, should easily meet the reliability criterion set forth in Ohio v. Roberts. The child is under oath and defense counsel has full opportunity to cross-examine. Moreover, since the defendant is typically present

at the taping, problems of face-to-face confrontation are avoided. Yet, critics of this technique have argued that it threatens the defendant's rights to a public trial and a jury trial because the jury and public are not physically present when the videotape is made.[15] And, as was discussed in Chapter 5, the psychological effects of the videotape/television medium on jurors' perceptions are uncertain. It is interesting to note, though, that in some cases, the courts themselves have expressly acknowledged the superiority of videotape technology over other methods of reproducing a witness' testimony when the witness is unavailable for trial (such as an audio or written recording of the preliminary hearing or having someone relate the witness' testimony).[16]

Practical Concerns

Three of the jurisdictions we visited currently have legislation permitting introduction of videotaped testimony in lieu of a live appearance at trial: California (which permits only a videotape made at the preliminary hearing), Wisconsin, and Florida. In each state, the prosecutors we interviewed alluded to several practical obstacles that constrained their use of videotape technology.

In states like Florida and Wisconsin, the videotape is made at a formal deposition. The deposition is generally taken in the judge's chambers or another small room where all the participants can be seated around a conference table. Although this removes child witnesses from the imposing milieu of the courtroom, it places them in close physical proximity to the defendant. Many prosecutors and victim advocates maintain that such a deposition can be far more harrowing to a child than giving testimony in court. If the statute requires a finding of emotional trauma or unavailability before this technique can be used, the child may be subjected to a battery of medical and/or psychiatric tests by examiners for the state and the defense. Prosecutors say that a videotaped deposition merely substitutes one formal proceeding for another. They report that a child who successfully endures all the pretrial events can probably handle a trial as well.

In California, videotapes may be taken at preliminary hearings, which closely resemble trials since the probable cause determination must be based solely on legally admissible evidence. (This is not the case in most other states, where hearsay is admissible at the preliminary

hearing and the child may not have to appear at all.) Prosecutors in Ventura observed that a child who withstands the preliminary hearing can likewise endure the trial.

* * *

Despite widespread interest in the use of videotape technology to alleviate the stress on child victims, there are both legal and practical questions that tend to limit its use by prosecutors even where enabling legislation exists. Videotaping the child's first statement appears more promising than the videotaped deposition. Although the child must still be available to testify, the early videotape captures the child's candid reaction to the incident, helps to reduce the total number of interviews the child must endure, and reportedly encourages confessions and guilty pleas. Where the videotape can be admitted into evidence, it serves as a "failsafe" against the possibility of a child recanting on the witness stand (with appropriate explanations from experts), thereby enabling the state to prosecute cases that might otherwise be dismissed. To protect the victims' privacy, all videotapes should be placed under protective orders. Above all, to ensure the tapes' admissibility at trial, interviewers should be thoroughly trained to elicit the necessary information without unduly leading or encouraging the child.

When considering a videotaped deposition as a substitute for live testimony, prosecutors note that confronting the defendant across a conference table may be more stressful than confronting him from the witness stand. Primarily, however, they are concerned with the jury's reaction to videotaped testimony. As one prosecutor told us, she much preferred to "let the jury see the little angel".

FOOTNOTES

1. Attorney General's Task Force on Family Violence, Final Report, September 1984, pp. 27, 33.

2. U.S. Department of Justice, National Institute of Justice, Statement of Recommended Judicial Practices, Adopted by the National Conference of the Judiciary on the Rights of Victims of Crime (Rockville, MD: National Criminal Justice Reference Service, 1983), p. 12.

3. Alaska, Arizona, Arkansas, California, Colorado, Florida, Kentucky, Louisiana, Maine, Montana, New Mexico, South Dakota, Texas, and Wisconsin. New York's videotape law applies only to testimony presented to the grand jury; in Virginia, the transcript of a deposition (videotape is not specified) may substitute for live testimony in a sexual assault trial only if the defendant consents.

4. This effect was reported to us in telephone interviews with prosecutors across the country. See also, Reinhardt Krause, "Videotape, CCTV Help Child Abuse Victims Tell Their Story But Legal Problems Remain," Law Enforcement Technology (November 1984): 16-18, and Steve Chaney, "Videotaped Interviews with Child Abuse Victims: The Search for Truth Under a Texas Procedure," in National Legal Resource Center for Child Advocacy and Protection, Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases (Washington, D.C.: American Bar Association, forthcoming).

5. Michael H. Graham, "Child Sex Abuse Prosecutions: Hearsay and Confrontation Clause Issues," in National Legal Resource Center for Child Advocacy and Protection, Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases (Washington, D.C.: American Bar Association, forthcoming).

6. Chaney, "Videotaped Interviews," supra, note 4.

7. Jolly v. State, 681 S.W. 2d 689 (Tex. App. 14th Dist. 1984).

8. Sue Mele, "Frequently Litigated Issues in Criminal Cases Involving Family Violence," in Multidisciplinary Advocacy for Mistreated Children, ed. Donald C. Bross (Denver: National Association of Counsel for Children, 1984), p. 281.

9. Chaney, "Videotaped Interviews," supra, note 4.

10. Ibid.

11. Commonwealth v. Willis, No. 84-CR-346 (Fayette Cir. 1985).

12. For a thorough analysis of these issues, see Graham, "Child Sex Abuse Prosecutions," supra, note 5.

13. Note, "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations," Harvard Law Review, Vol. 98 (Feb. 1985 forthcoming).

14. Ibid.

15. James J. Armstrong, "The Criminal Videotape Trial: Serious Constitutional Questions," Oregon Law Review, Vol. 55 (1976): 567-585.

16. See, for example, State v. Hewett, 545 P.2d 1201 (Wash. App. 1976), and Hutchins v. State, 286 S.2d 244 (D. Ct. App. Fla., 1973).

VII. SPECIAL EXCEPTIONS TO HEARSAY

The purpose of the rule against admitting hearsay is that out-of-court statements are inherently unreliable. The statements are not made under oath, and the defense has no opportunity to cross-examine the declarant. To be entered as evidence, hearsay must fall into one of the narrow exception categories.

In cases of child sexual abuse, the child's out-of-court statements may be the most compelling evidence in the government's arsenal. Indeed, hearsay may be the only evidence, since child sexual abuse frequently occurs in the absence of other witnesses or physical trauma to the child, and the child may be found incompetent or otherwise unavailable as a witness. But even the youngest, most immature sexual abuse victims often make casual, innocent remarks that are alarmingly accurate in their portrayal of sexual activities that should be unknown to a child. Such statements are usually inadmissible because they cannot fit into the available exception categories.

Limitations of Available Exceptions to Hearsay[1]

The hearsay exceptions that are most commonly applicable to sexual assault cases are complaints of rape, medical complaints, and excited utterances. But they have limited value when the victim is a child, because of the unique characteristics of the offense and the way children react to it.

For example, the complaint of rape theory allows rape complaints to be admitted as evidence to corroborate the victim's testimony in order to rebut an inference of silence inconsistent with the victim's story. There are two reasons why the exception is of limited value in

child sexual abuse cases. First, the theory generally applies to forcible rape cases, where a victim's failure to complain may be construed as "consent." In statutory rape cases (i.e., where the victim is a child), however, consent is not an issue, leading some courts to hold that the complaint of rape is immaterial and therefore inadmissible.

Also, a child victim may never make a complaint of rape. As we discussed in Chapter 2 above, child sexual abuse victims frequently endure ongoing abuse for long periods of time--even years--before their victimization is revealed. Even then, the revelation may occur fortuitously or inadvertently, not because the child complained.

The medical complaints exception to hearsay suffers similar limitations when applied to child sexual abuse cases. Under this exception, statements made relating to bodily feelings or conditions are admissible to prove their truth. Typically, such statements are made to a physician for purposes of obtaining a diagnosis or treatment. The underlying assumption is that people do not fabricate such information because they believe the effectiveness of treatment will rely in large part on the accuracy of the information they provide.

In a child sexual abuse case, this exception applies only when the child has sustained visible injuries, pain, or discomfort serious enough to warrant medical attention. But many sexual abuse incidents result in little or no physical injury to the child, so that medical intervention is never sought. Moreover, an attempt to introduce the testimony of a psychologist to whom a child was referred for diagnosis of sexual abuse has been rejected as an inappropriate application of the medical complaints exception. (State v. Mueller, 344 N.W. 2d 262 (Iowa App. 2 Dist. 1983).)

The excited utterances ("spontaneous exclamation," or res gestae) exception to hearsay is the one most often applicable to child sexual abuse cases. The two essential requirements of an excited utterance are: (1) a sufficiently startling experience suspending reflective thought, and (2) a spontaneous reaction, not one resulting from reflection or fabrication. The requirement of spontaneity is often measured in terms of the time lapse between the startling event and the statement. Traditionally, the statement must have been made contemporaneously with the event, but the modern trend is to consider whether the delay provided an opportunity to fabricate the statement.

The courts have relaxed the excited utterances exception to allow in statements made by a child victim days, weeks, or even months after the abusive incident.[2] Their reasoning in these cases reflects an awareness of a very important distinction between children and adults:

> Considerable latitude in temporal proximity is particularly evident in cases involving assertions by very young children after a stressful experience. [citing cases] This latitude is a recognition of the fact that children of tender years are generally not adept at reasoned reflection and at concoction of false stories under such circumstances.[3]

Despite the court's willingness to broaden the temporal requirement of the excited utterance exception, there are still many cases where the exception does not apply. Depending on the nature of the abuse, for example, children may be unaware that it is "wrong," and so their remarks about it may appear unconcerned or even casual. Also, the child's delay in making the statement may far exceed even the most liberal interpretation of the excited utterance exception. Reasons for the child's reticence include fears of not being believed, feelings of confusion and guilt, efforts to forget, and threats against the victim by the defendant.

The Residual Hearsay Exception

There is another hearsay exception that may be available in some states. This is the "residual" hearsay exception, as exemplified in Fed. R.Evid.R. 803:

> Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial
>
> Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, has intention to offer the statement and the particulars of it, including the name and address of the declarant.

This exception often applies in child sexual abuse cases because the out-of-court statements children make generally have "equivalent circumstantial guarantees of trustworthiness." Indicators of trustworthiness may include, for example, the age of the child, the nature of the abuse, the presence of physical evidence, the relationship between the child and the defendant, and the spontaneity of the statement.[4] When, for example, a seven-year-old girl asks her father, "Daddy, does milk come out of your wiener? It comes out of Uncle Bob's and it tastes yukky,"[5] there can be little doubt that the child has been sexually abused. Under the residual hearsay exception, the court could admit this statement by considering indicia of reliability other than its temporal proximity to the event or its reflection of a "startled" reaction.

Yet even this residual hearsay exception has its limitations in child sexual abuse cases. Many states have not adopted this rule because they fear it is too broad and could be applied inappropriately.[6] Also, because the exception contains no guidelines or standards of trustworthiness, it could be applied unevenly or inconsistently.[7]

Hearsay Exception for Sexually Abused Children

Rather than "torture" or "stretch" the available exceptions to the point where they lose sight of their original intent, a number of experts have recommended,[8] and at least nine states have statutorily created, a special exception explicitly limited to child sexual abuse victims.[9] Washington's statute is a good example of this type of legislation:

> **9A.44.120 Admissibility of child's statement—Conditions.** A statement made by a child when under the age of ten describing any act of sexual conduct performed with or on the child by another, not otherwise admissible by statute or

court rule, is admissible in evidence in criminal proceedings by the courts of the state of Washington if:

1) The court finds, in a hearing, conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

2) The child either:

   (a) Testifies at the proceeding; or

   (b) Is unavailable as a witness; Provided, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

Recent court decisions have upheld this statute and the Kansas statute (K.S.A. 60-460 (dd)) (which is different in language but similar in intent).[10] The courts have found that these statutes do not abridge the defendant's right of confrontation, even where the child does not testify, under the test set forth by the United States Supreme Court in Ohio v. Roberts, 448 U.S. 56 (1980). In this seminal case, discussed in Chapters 5 and 6, the Court established a two-part test for determining whether admission of out-of-court statements of a witness who does not testify at trial violates the defendant's right of confrontation. First, there must be a finding that the witness is unavailable; if so, then the statements must either fall into a firmly rooted hearsay exception or have "adequate 'indicia of reliability'." (448 U.S. 56, at 66).[11]

It is important to note that the Washington statute, which requires a finding that the child is unavailable as a witness, may not apply when

the child witness is found incompetent, on grounds that the statement of such a child (unless an excited utterance) is inherently unreliable and therefore inadmissible.[12] On the other hand, the Kansas statute, which requires a finding that the child is "disqualified or unavailable," clearly extends the hearsay exception to statements made by children who are found to be incompetent as witnesses.[13] The Indiana statute explicitly lists three conditions under which a child may be found unavailable as a witness:

Ind. Code §35-37-4-6.

(i) A psychiatrist has certified that the child's participation in the trial would be a traumatic experience;

(ii) A physician has certified that the child cannot participate in the trial for medical reasons; or

(iii) The court has determined that the child is incapable of understanding the nature and obligation of an oath.

The Washington statute also provides that the court hold a hearing to determine the reliability of the child's statement. Sheryl K. Petersen, in a Washington Law Review article analyzing the Washington statute, suggests that the court interview the person who will testify concerning the statement, any other witnesses to the statement, any persons who have knowledge of the alleged sexual assault, and, if possible, the child. The questioning should attempt to determine:

- the time lapse between the alleged act and the statement;
- whether the statement was made in response to a leading question;
- whether the child or the witness has any bias against the defendant or motive for fabricating the statement;

- whether the statement was made while the child was still upset or in pain because of the incident;

- whether the terminology of the statement was age-appropriate for the child; and

- whether any event that occurred between the alleged act and the child's statement could have accounted for the contents of the statement.

Petersen believes the court should also require corroborative evidence showing that the defendant had the opportunity to commit the crime and that the physical condition of the child is consistent with the out-of-court statement.[14] However, it is important to note that corroboration is not equivalent to reliability,[15] and is unnecessary to meet the requirements set forth in Ohio v. Roberts.

Prosecutors in states that have adopted special exceptions to hearsay report using them frequently and successfully, in terms of getting the child's out-of-court statement admitted into evidence. (It is too early to tell whether these laws enable more cases to be filed, or whether these hearsay statements give rise to more convictions.) The circumstances of many child sexual abuse cases lend themselves quite naturally to the statutes' stipulations. Moreover, these hearsay exceptions can be indispensable in cases where the child is incompetent or otherwise unavailable to testify; even where the child does testify, the hearsay statement can be used to enhance the child's credibility.

* * *

The special hearsay exception for child sexual abuse victims may offer the only way to prosecute certain cases. Where such laws are already on the books, prosecutors should use them wherever possible. Prosecutors in other states may be able to introduce a child's out-of-court statements under a residual hearsay exception similar to the Fed. R.Evid.R. 803, reproduced above. Elsewhere, lawmakers and court rules committees should seriously consider enacting appropriate provisions.

FOOTNOTES

1. Much of the material in this section is drawn from Josephine Bulkley, "Evidentiary Theories for Admitting a Child's Out-of-Court Statement of Sexual Abuse at Trial," in National Legal Resource Center for Child Advocacy and Protection, Child Sexual Abuse and the Law, ed. Josephine Bulkley (Washington, D.C.: American Bar Association, 1981), pp. 153-165.

2. See, for example, Lancaster v. People, 61 P.2d 720 (Colo. 1980), and People v. Ortega, No. 81-CA0572 (Colorado Court of Appeals, August 18, 1983).

3. Ibid.

4. Judy Yun, "A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases," Columbia Law Review, Vol. 83 (1983): 1762.

5. Excerpted from Lucy Berliner and Mary Kay Barbieri, "The Testimony of the Child Victim of Sexual Assault," Journal of Social Issues, Vol. 40 (1984): 133.

6. See, for example, In Re: W.C.L., Jr., 650 P.2d 1302 (Colo. App. 1982), in which the court recognizes the state legislature's rejection of a residual hearsay exception.

7. Supra, note 3 at 1763.

8. See, for example, National Legal Resource Center for Child Advocacy and Protection, Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases (Washington, D.C.: American Bar Association, 1982), p. 34; and Mary M. Emmons, Executive Director, Children's Institute International, Los Angeles, California, Testimony before the Attorney General's Task Force on Family Violence, February 1984.

9. The nine states are Arizona, Colorado, Delaware, Indiana, Kansas, Minnesota, South Dakota, Utah, and Washington.

10. See for example, State v. Slider, No. 12888-4-I (Wash. App. 9/24/84), and State v. Rodriquez, 657 P. 2d 79 (Kan. App., 1983).

11. For a thorough treatment of the legal concerns raised by these statutes, see Michael H. Graham, "Child Sex Abuse Prosecutions: Hearsay and Confrontation Clause Issues," and G. Joseph Pierron, "A Comparative Analysis of Nine Recent State Statutory Approaches Concerning Special Hearsay Exceptions for Children's Out-of-Court Statements Concerning Sexual Abuse," in National Legal Resource Center for Child Advocacy and Protection, Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases (Washington, D.C.: American Bar Association, forthcoming). See also, Note, "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations," Harvard Law Review, Vol. 98 (Feb. 1985, forthcoming).

12. State v. Ryan, No. 50216-1 (Wash. Sup. Ct. 11/26/84).

13. See, for example, State v. Pendelton, No. 56, 112 (Kan. Ct. App. 11/21/84).

14. Sheryl K. Petersen, "Sexual Abuse of Children: Washington's New Hearsay Exception," Washington Law Review, Vol. 58 (Nov. 1983): 827.

15. State v. Slider, supra note 9.

VIII. USE OF EXPERT WITNESSES

Both the National Legal Resource Center for Child Advocacy and Protection[1] and the Attorney General's Task Force on Family Violence[2] recommend that the court permit expert witnesses to testify on selected attributes of child sexual abuse. The purpose of allowing expert testimony is to aid the trier of fact in evaluating and understanding matters that are not within the common experience of jurors.

There are three general avenues for introducing expert testimony in child sexual abuse cases.[3] The first, and most liberal, is to give an opinion as to the child's truthfulness or credibility. Such testimony is almost always disallowed on grounds that it usurps the function of the jury. A second avenue is to bolster the child's testimony without a direct comment as to the child's credibility. Such testimony may be offered in the form of statistics showing the frequency of certain behavior patterns among known child sexual abuse victims or offenders. Alternatively, it may refer to a "sexually abused child syndrome." Briefly, proponents of this approach argue that if any two of the following characteristics are present in a pre-pubertal child, there is a high probability that sexual abuse has occurred:[4]

1) Neurasthenia symptoms without physiological basis, including: fatigue; weakness; headaches; bedwetting or excessive urination; stomach aches; ringing in the ears; sleeping, vasomotor, memory or concentration disturbances; or complaints of numerous and constantly-varying aches.

2) "Acting out" behavior, including: frequent masturbation and/or indiscriminate and pseudo-seductive behavior.

3) Father denies and: a) has "blackout spells" due to excessive drinking; b) says girls should be prepared for later sexual experiences; or, c) shows no concern and makes statements such as "All fathers do that," "If you raise a child, you should be able to do what you like with her," "She's promiscuous anyway."

4) Physical evidence, via careful laboratory analyses, reveals semen or pubic hair on bedding or clothing at alleged scenes of incident.

5) Allegations by siblings of similar mistreatment.

6) Child assumes many maternal responsibilities inappropriate for her age and family circumstances.

For a post-pubertal child, three additional factors are suggested:

7) Medical evidence of sexual activity where the child is not sexually involved with anyone else.

8) Gender role confusion of child.

9) Father is abnormally concerned about child's dating habits and social activities.

In general, these lines of expert testimony have not been well-received by the courts. They have not permitted specific behaviors to be inferred from statistical generalizations. Moreover, the judges we interviewed believed that the sexually abused child syndrome lacks sufficient empirical support to justify admitting it as evidence.

The third, and most commonly acceptable use of expert testimony is to rebut defense attempts at impeaching the child's testimony. Experts are increasingly being called upon to counter three common lines of attack by the defense: (1) Why did the child endure the abuse for so

long? (2) Why did the child finally disclose the situation? and (3) Why do family members contradict the child's story?[5] These questions are familiar to most professionals who work with incest victims, and as we have shown in Chapter 2 of this report, there is a growing body of literature indicating that the answers are quite similar among incestuous families as a group. Experts can testify from their own knowledge of this formal literature and their own experience working with child victims to explain the apparent inconsistencies to the judge and jury. Here, statistics can be offered to show that a child's behavior is not inconsistent with general patterns of sexually abused children (as opposed to arguing that, because the child behaved this way, she must have been abused). The sample testimony presented in Exhibit 3 illustrates how an expert can counter a challenge to the child's story based on delay in reporting.

Expert witnesses may also provide developmental information to compare normal behavior patterns with those of a child who was allegedly sexually abused:

> The inappropriate language and pseudo-sexual, emotionally promiscuous, and highly sexualized conduct of such children can be given proper significance by lay persons when a person with wide experience in dealing with ordinary children states how unusual such behavior is.[6]

As with many of the other procedural reforms we have considered in this report, there are a number of practical concerns that dissuade prosecutors from relying too heavily on expert witnesses:

> Not every community has an expert available to evaluate the child and to testify. . . , nor is the current research on child witnesses so conclusive as to permit such testimony in every case. Moreover, such a psychological evaluation is . . . costly. . . , time-consuming. . . , and more than a little invasive of the child's privacy. Even worse, the expert may discover and document things about the child's psychological status that detract from his/her credibility.[7]

Any of these concerns can convince a prosecutor to forego the use of an expert witness. For example, common sense suggests that qualifying

experts would become easier as specialized sexual abuse and incest treatment programs establish sound reputations in communities of all sizes.[8] But, the recent surge of media discussions and educational campaigns about the subject may have the opposite effect, i.e., making it difficult to persuade the court of the need for an expert. Prosecutors are also rightfully concerned about provoking a "battle of the experts," in which the child's emotional stability is probed and debated by experts for the state and the defense. In one case, for example, the trial court excluded the testimony of a child psychiatrist that had been offered by the defense to impeach the child witness' credibility. On appeal, this was found to be an abuse of the trial court's discretion, because the psychiatrist's testimony would have demonstrated a defect in the child's capacity to remember and ability to communicate his observations.[9]

We found, in general, that prosecutors tend to view expert testimony as a measure of "last resort," preferring to answer the questions raised in cross-examination via other means that they consider to be more effective. For example, prosecutors in Milwaukee sought, wherever possible, to counter defense challenges by relying on the facts of the case. Thus, in a case where the defense challenges the child's delay in reporting the abuse, prosecutors prefer to introduce evidence of threats made to the child, if available.

It is important to note, however, that even where courts are reluctant to qualify expert witnesses in the area of child sexual abuse, prosecutors should avail themselves of the experience and knowledge that such people possess. The information they provide can be woven into the prosecutor's opening and closing statements, for example, to educate the trier of fact about aspects of the child's behavior that cannot be adequately explained in the context of trial testimony. Experts may be able to suggest ways of questioning potential jurors to uncover biases regarding children's propensity for lying or fantasizing. At a minimum, prosecutors themselves should seek expert advice to guide them in interviewing child witnesses and assessing the value of their testimony.

* * *

Although there is certainly much more to learn about the phenomenon of child sexual abuse, the state-of-the-art has advanced rapidly in recent years. There is a growing cadre of professionals whose knowledge

and expertise should be tapped by the courts when appropriate questions arise. Even if there is no need to introduce expert witness testimony in a case, or if there are problems qualifying an expert in the field, prosecutors should at least consult with mental health professionals for advice on interviewing the child, interpreting the child's behavior, and preparing the opening and closing statements. Prosecutors should also be prepared to counter defense challenges utilizing this same tactic.

Exhibit 3

SAMPLE EXPERT WITNESS TESTIMONY IN A CASE OF CHILD SEXUAL ABUSE*

Q. Ms. Berliner, based on your experience in this field and your contacts with the victims yourself, could you say whether or not it is unusual for a child not to have reported an incident of sexual abuse by a parent immediately?

A. Well, in fact, the opposite is true. The overwhelming majority of children who are sexually abused do not report the events at all during their childhood. Studies have repeatedly shown that in studies of people of nonclinical populations, meaning people randomly selected, that a significant percentage of those populations say they were sexually abused as children but never told anyone. The statistics are about two thirds to three quarters when they're adults say they didn't report it when they were children.

Of the children we see, the majority of children do not report it shortly afterwards and the--when the offender or the accused offender is a parent, the delay is likely to be the greatest. In other words, the closer the relationship of the offender to the child the longer it is likely to be before the child tells somebody, if they tell at all.

Q. So is it unusual for the delay to have been a year or a year and a half?

A. No--well, in most cases where it happens within a family, 80 percent of the time it happens more than once. Frequently, it will go on for years and years and years. So that when we are talking about reporting it we would describe reporting it from the last time something happened, so even then there is usually a significant delay between the last incident and the time it comes to somebody's attention.

Q. As far as your actual contacts with these children as well as your research and your studies, have you come to an understanding of the dynamics, the response, why these are not reported?

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*Excerpted from the testimony of Lucy Berliner in State v. Doyle, No. 80-1-03135-6 (Super. Ct. Wash., Dec. 19, 1980).

A. Well, most--well, all children are taught to obey and respect their parents and to essentially do what they are told. We don't educate children to be able to evaluate when a parent is going against the rules because parents have complete authority and control over children and they can convey to a child that--children simply don't have the choice not to do something if a parent tells them to do it. Children tend to think that if their parent is telling them to do it, then there must be something right about it. Even if it seems like it's wrong or it doesn't feel good or it hurts, a child still--childhood is full of experiences that are unpleasant but that are ordered by parents. I might make the analogy of going to the dentist. No child wants to go to the dentist but as a parent you have to do things to children that is for their own good. When a parent is doing something to a child that isn't for their own good, the child doesn't have the skills to necessarily assess that. So almost invariably children simply go along with it whether or not there is any overt threat because they assume there must be a reason for it that--as children have said to me, "I thought I must have done something wrong for him to do this but I didn't know what it was."

FOOTNOTES

1. National Legal Resource Center for Child Advocacy and Protection, Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases (Washington, D.C.: American Bar Association, October 1982), p. 37.

2. Attorney General's Task Force on Family Violence, Final Report, September 1984, p. 41.

3. This analysis draws largely from Rebecca J. Roe, "Expert Testimony in Child Sexual Abuse Cases," in National Legal Resource Center for Child Advocacy and Protection, Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases (Washington, D.C.: American Bar Association, forthcoming).

4. S. Mele-Sernovitz, "Parental Sexual Abuse of Children: The Law as a Therapeutic Tool for Families," in Legal Representation of the Maltreated Child, ed. Donald C. Bross (Denver: National Association of Counsel for Children, 1979), p. 82.

5. Supra, note 1 at p. 38.

6. Donald C. Bross, "Protecting Child Witnesses," in Multidisciplinary Advocacy for Mistreated Children, ed. Donald C. Bross (Denver: National Association of Counsel for Children, 1984), p. 197.

7. David W. Lloyd, "Practical Issues in Avoiding Confrontation of a Child Witness and the Defendant in a Criminal Trial," in Papers from a National Policy Conference, supra, note 3.

8. Until recently, there were extremely few mental health professionals who had sufficient experience in this area to qualify as expert witnesses. For a discussion on prerequisites for qualifying as an expert witness in child sexual abuse cases, see Lucy Berliner, Linda Canfield-Blick, and Josephine Bulkley, "Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development," in National Legal Resource Center for Child

Advocacy and Protection, Child Sexual Abuse and the Law, ed. Josephine Bulkley (Washington, D.C.: American Bar Association, July 1981), pp. 169-173.

9. State v. Halstead, No. 83-569 (Iowa Ct. App., 9/25/84).

IX. THE VICTIM ADVOCATE

The National Legal Resource Center for Child Advocacy and Protection,[1] National Conference of the Judiciary on the Rights of Victims of Crime,[2] and Attorney General's Task Force on Family Violence[3] all have recommended provision of a support person for child witnesses in criminal proceedings. In addition, several states have statutorily authorized the provision of a victim advocate for children in criminal court. Statutes in Colorado and Wisconsin, for example, allow a "friend of the court" to accompany the child to all judicial proceedings and to make recommendations to prosecutors and judges regarding the child's ability to testify and the need to consider alternative mechanisms:

> **Wis. Sta. 950.055(2)**....counties are encouraged to provide the following additional services on behalf of children who are involved in criminal proceedings as victims or witnesses:
>
> (a) Explanations, in language understood by the child, of all legal proceedings in which the child will be involved.
>
> (b) Advice to the judge, when appropriate, and as a friend of the court, regarding the child's ability to understand proceedings and questions. The services may include providing assistance in determinations under §967.04(7) and the duty to expedite proceedings under §971.105.

(c) Advice to the district attorney concerning the ability of a child witness to cooperate with the prosecution and the potential effects of the proceedings on the child.

(d) Information about and referrals to appropriate social services programs to assist the child and the child's family in coping with the emotional impact of the crime and the subsequent proceedings in which the child is involved.

Several other states, including California and Idaho, permit child witnesses to have a supportive person throughout the trial proceedings.

Even in jurisdictions lacking statutory authorization, there often are victim advocates who provide accompaniment and support to court-involved children. However, the statutes and recommendations cited above suggest a trend toward enlarging the role of the child victim advocate. This chapter discusses some of the issues that arise with direct victim advocacy in the criminal court setting.

Friend of the Court

In many communities throughout the United States, child victims are offered support from victim/witness assistance programs. Typically, these advocates counsel the victims and accompany them to all court proceedings, and, if necessary, the medical examination. The advocate provides age-appropriate instruction in legal procedure and terminology and often takes the child for a tour of the courtroom. The advocate/counselor may also serve as a broker to obtain other services for the child and family. Sometimes, the advocate is permitted to lead the questioning for purposes of obtaining the child's statement while the police investigator and/or prosecutor look on. To avert subsequent allegations of leading or coaching the witness, however, these interviewers must be highly skilled and specially trained in investigative interviewing techniques.

This model is relatively easy to implement, since it can be managed by lay citizens who often work as volunteers. Larger prosecutors' offices may sponsor their own victim assistance programs, as we ob-

served in the Milwaukee and Ventura District Attorneys' Offices. Such programs enjoy the advantages of specialized staff and close proximity to the prosecutors handling these cases. In both sites, victim assistants had comfortable working relationships with prosecutors and could advise as to a child's ability to withstand repeated interviews or cross-examination.

The victim assistant model is not without its drawbacks, however. Some defense attorneys accuse the assistants of "coaching" the children to say the "right things" in court. Sometimes, defense attorneys call the victim assistants as witnesses and then obtain a court order to keep them out of the courtroom during the child's testimony. To counter this tactic, victim assistants in Milwaukee and Ventura carefully avoid discussing details of the alleged incident with children and take minimal notes on their interviews, thereby giving the defense little pretext for calling them as witnesses. "Coaching" more often takes the form of assuring children that "It's okay to say 'I don't know' " when they're on the witness stand.

In both Milwaukee and Ventura, victim assistants provided training for judges and prosecutors and were generally highly regarded within the court community. Prosecutors respected their opinions and often consulted them about a child's capabilities as a witness. The situation in these jurisdictions may be unusual, however. Elsewhere, the advice of victim assistants may not be well received by the prosecutors, particularly without a legislative endorsement of their role. Smaller jurisdictions may not have a victim assistance program at all. In such communities, who will stand up for the child's needs? One alternative is the guardian ad litem.

The Guardian Ad Litem

In the juvenile court, where most allegations of child abuse and neglect are adjudicated, child victims typically have a guardian ad litem (GAL) appointed by the court to represent their best interests. Appointment of a GAL is mandated under the Child Abuse Prevention and Treatment Act of 1974 for states wishing to receive federal funds.[4] Although the language of the federal legislation refers generally to "judicial" proceedings, the appointment of a GAL occurs only in juvenile court.

But in some jurisdictions, GALs voluntarily carry over some of their functions into the criminal process as well.

The role of the GAL in juvenile court is akin to, but larger than, that of a victim/witness assistant. (See Exhibit 4 on the following page.) In addition to accompanying the child to court proceedings and obtaining needed social, medical, or mental health services, the GAL can make recommendations directly to the court and, in some instances, may even call and question witnesses.

The most important benefit of allowing a GAL to continue assisting a child in criminal proceedings is the link it provides between the two court systems. As will be discussed in Chapter 10, children are often confused by the two sets of proceedings, and even the courts may issue conflicting orders. The continuity provided by the GAL can help to reassure the child and correct inefficiencies in the courts. However, the GALs we interviewed complained that, because there was no formal means of alerting them when a criminal complaint was filed, they would often find out fortuitously or not at all.

In both Orlando and Des Moines, guardians ad litem proactively find out about criminal court actions so they can continue to represent their clients' best interests. In Des Moines, attorneys from the private, nonprofit Youth Law Center are appointed by the juvenile court to serve as GALs. In criminal proceedings, they continue to provide accompaniment, support, and legal advice to their clients. They do not, however, file motions or voice objections in court, nor do they make recommendations directly to the prosecutor. In one case, for example, the Youth Law Center attorney believed that the child victim, scheduled to testify in criminal proceedings against her father, would benefit from some form of intervention to shield her view of the defendant during her testimony. (State v. Strable, 313 N.W. 2d 497 (Iowa 1981) discussed above in Chapter 5.) However, rather than make this suggestion to the prosecutor handling the case or directly to the court, the attorney apprised the child's mother of the possibility and recommended that she raise it with the prosecutor.

In Orlando, guardians ad litem are appointed from the Orlando Bar Association. On several occasions, they have filed motions in their efforts to represent child clients in criminal proceedings. In one case, for example, the GAL requested substitution of a videotaped deposition

Exhibit 4

TEN POTENTIAL FUNCTIONS OF A GUARDIAN AD LITEM*

1. To act as a mediator in bringing parties to a consensus prior to court hearings;

2. To provide coordination between the juvenile court and other court departments (e.g., probate, adult criminal) through the presentation of additional information;

3. To provide continuity of case information throughout the court process;

4. To persuade the social worker to consider an alternative placement recommendation;

5. To reduce trauma to the minor through the presence of the guardian ad litem in the courtroom, and to provide continuity of relationship with the child;

6. To bring an existing case back to the court's attention to be set on calendar;

7. To make recommendations in the best interests of the child or to raise questions for the court's use which further promote the best interests of the child;

8. To assure that the child receives the attention from those persons responsible to meet the child's needs, to help identify the special needs of the child and resources to meet those needs;

9. To argue directly or request that an attorney argue to prevent continuances which are not in the interests of the child;

10. To request independent counsel for the child.

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*Janet K. Wiig, "Functions of the Guardian Ad Litem in Child Abuse and Neglect Proceedings, Los Angeles Juvenile Court," in National Legal Resource Center for Child Advocacy and Protection, National Guardian Ad Litem Policy Conference Manual (Washington, D.C.: American Bar Association, 1982).

for live testimony in court (under Fla. §918.17 (1984)). Although the request was denied, the GAL had at least succeeded in bringing the child's plight to the court's attention.

Attorney vs. Lay Citizen?

Some authors recommend that child victims have independent legal counsel in criminal court proceedings.[5] Ideally, the victims' interests would coincide with those of the state, but where children are involved, and particularly in intrafamilial cases, the situation may be far from ideal. Prosecutors may be inexperienced in these cases and unaware of alternative measures they can use in court. Worse, prosecutors who are untrained or insensitive may place secondary importance on the child's wishes and feelings in their zeal to obtain a conviction and lengthy sentence. In fact, this latter reason contributes largely to the rationale behind appointment of a GAL in juvenile court.[6]

The important advantage of having attorneys as advocates is their greater understanding of the legal process and, with experience or proper training, their knowledge of applicable statutory and case law. These advantages would carry considerable weight in criminal court, where child sexual abuse cases in particular can become exceedingly ugly and complex. On the other hand, appointing legal counsel for child victims can be costly. In Des Moines, this factor is minimized because the Youth Law Center procures grants from foundations and charities that permit it to enlarge its scope of services. In Orlando, attorneys serve as GALs pro bono as part of their Bar Association membership requirements. This latter option appears less desirable because private attorneys typically have competing demands on their time and may have little or no criminal court experience.

In structuring their GAL programs, both the Youth Law Center in Des Moines and the Bar Association in Orlando have recognized the limitations on lawyers' time. In both locations, GAL attorneys are teamed with lay advocates. In Des Moines, the lay assistant is a social worker on the staff of the Youth Law Center; in Orlando, the assistant is a volunteer citizen recruited and trained specifically for this purpose. Under the team arrangement, the lay assistant generally assumes the time-consuming roles of case investigator and companion to the child so the attorney can focus on legal issues and maneuvers. This approach

appears to offer maximum help at minimum cost, especially in criminal cases, although the Orlando model must provide considerable training for its volunteers, since neither the attorneys nor the lay advocates are dedicated full-time to this work.

The comparative advantages of lawyers and lay advocates have been examined and are summarized in Exhibit 5.

From a legal perspective, the propriety of a child victim having independent counsel in a criminal action is questionable. First, because the criminal court cannot remove a child from the home, it lacks the principal justification for appointing a guardian ad litem that applies in juvenile court. Second, because the victims are not a party to a criminal case, they are not entitled to state-appointed representation (unless they, too, are suspects in other cases). Finally, because it is the defendant's liberty that is threatened in a criminal proceeding (and not the child's), some critics have suggested that an active, participating attorney for the child may violate due process.[7]

Very few of the judges we interviewed objected to the concept of independent representation for a child victim in criminal proceedings. (In fact, the prosecutors were more likely than judges or defense attorneys to object to a child having independent representation.) One judge in Orlando noted that although the child's attorney would not be counsel of record, he or she could observe the proceedings and speak outside of the jury's presence. Another judge believed the child's attorney could object if "things got out of hand." But the National Conference of the Judiciary on the Rights of Victims of Crime apparently disagrees. In its statement of Recommended Judicial Practices, the National Conference would permit an individual of the victim's choice to accompany the victim in closed juvenile or criminal proceedings, and in camera proceedings, and to remain with the victim in the courtroom. However, the National Conference clearly draws the line at participating in judicial proceedings.[8]

* * *

There is little doubt that a child victim needs a "friend" in court. The controversy centers on the scope of the advocate's role. Should advocates seek to advise prosecutors as to the victim's wishes, fears,

Exhibit 5

LAWYERS VS. LAY ADVOCATES FOR CHILD WITNESSES*

Advantages of Lawyers	Advantages of Lay Advocates
Most cases involve mixed issues of law and fact as well as complex courtroom procedures.	Lay advocates, especially volunteers, will be less expensive.
Lawyers have a better understanding of the judicial system and how to use it more effectively for the child's interests.	Lay advocates may have more time and ability to investigate.
Lawyers may be more familiar with the applicable statutory and case law.	If professionals, they may have more knowledge of child development, social and psychological issues.
	If motivated, they may be more likely to continue representing the child after case disposition.

*Adapted from U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect, Child Abuse and Neglect Litigation, by the National Legal Resource Center for Child Advocacy and Protection (Washington, D.C.: Government Printing Office, March 1981), p. 59.

needs for privacy or protection from harrassment? Can advocates press for certain interventions or alternative techniques to help the victims testify? Our answers to these questions are affirmative, and we would borrow from the GAL model in juvenile court to suggest an analogous role in criminal court.

It also seems clear that the child's advocate need not be an attorney. The victim assistance units we observed in Milwaukee and Ventura attest to the immense contribution that nonlawyers can make, even in a court setting. However, in jurisdictions where victim assistants do not enjoy the respect and cooperation of prosecutors, their advice may go unheeded. Under such circumstances, a victim advocate needs direct access to the court. Whether an advocate can have legal standing in criminal cases is debatable; meanwhile, statutes like those of Wisconsin and Colorado offer an important endorsement and clarification of the advocate's role.

FOOTNOTES

1. National Legal Resource Center for Child Advocacy and Protection, Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases (Washington, D.C.: American Bar Association, October 1982), p. 9.

2. U.S. Department of Justice, National Institute of Justice, Statement of Recommended Judicial Practices, Adopted by the National Conference of the Judiciary on the Rights of Victims of Crime (Rockville, MD: National Criminal Justice Reference Service, 1983).

3. Attorney General's Task Force on Family Violence, Final Report, September 1984, p. 37.

4. Child Abuse Prevention and Treatment Act, P.L. 93-247, 1974.

5. See, for example, Jacqueline Y. Parker, "Rights of Child Witnesses: Is the Court a Protector or Perpetrator?" New England Law Review (1981-1982): 643-717.

6. See, for example, James R. Redeker, "The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases," Villanova Law Review, Vol. 23 (1977-78): 527-530; Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Counsel for Private Parties (New York: Ballinger Publishing Co., 1976), pp. 71-73.

7. Supra, note 1 at pp. 9-10.

8. Supra, note 2 at pp. 10, 12.

X. STREAMLINING THE ADJUDICATION PROCESS

Among the most frustrating aspects of our criminal justice system are (1) the need for witnesses to repeat their stories over and over again, and (2) the length of the adjudication process. The plight of an adult rape victim undergoing repeated questioning and experiencing innumerable continuances is well-known to criminal justice and mental health professionals. A child sexual assault victim shares this trauma, but it is vastly compounded when the perpetrator is a family member. Several jurisdictions have attempted to remedy these problems both legislatively and informally. These efforts are described below.

Limiting the Number of Interviews

In a typical criminal case, a witness may be interviewed by police, prosecutors, defense attorney, and probation officer several times each before the case reaches final disposition. Of course, there are also the formal interrogations at preliminary hearings, grand jury appearances, depositions, and trial.

In intrafamily abuse cases, additional agencies become involved and thus more interviews are needed. There will be physicians, social workers, and treatment specialists. There will be investigators and prosecutors handling the separate, but often concurrent, juvenile protection proceedings. There may be a guardian ad litem in juvenile court and a victim assistant in criminal court. If custody proceedings are instituted, there will be additional social workers and mental health professionals. Service providers who testified before the Attorney General's Task Force on Family Violence reported that child victims average at least a dozen investigative interviews throughout the course

of child protection proceedings, criminal prosecution, and custody proceedings.[1]

Many individuals who work with child victims believe that having to retell the story so many times is among the most traumatic aspects of the justice system. During our interviews, this concern was voiced by therapists, defense attorneys, prosecutors, judges, and police officers. Both the Attorney General's Task Force[2] and the National Legal Resource Center for Child Advocacy and Protection[3] have recommended limiting the number of interviews required of child victims, and several states have enacted laws specifically directed at this goal.[4]

There are several ways to consolidate the interview process:

1) by conducting some form of "joint" interview among two or more of the agencies involved;

2) by assigning specialists within each agency, so there is only one interviewer per agency;

3) by videotaping the child's first statement;

4) by eliminating the need for the child to appear at one or more of the formal proceedings; and

5) by coordinating juvenile and criminal court proceedings.

As with many of the other techniques discussed in the preceding chapters, there are practical constraints associated with each. These are examined below.

The Joint Interview

Legislatures in some states, such as Colorado and Maryland, have directed the establishment of joint investigation procedures for reported cases of child sexual abuse. Even without a legislative mandate, police and child protection agencies in jurisdictions throughout the country have developed protocols outlining procedures to be followed when one or the other agency receives a report of child abuse. Some of these

protocols encourage the agencies to conduct their investigations jointly, i.e., having either the police officer or the social worker lead the questioning while the other observes and takes notes. Although this arrangement may appear attractive on paper, in practice it tends to be unwieldy, for several reasons.

First, police officers and protective services workers have very different missions when conducting their first interviews on a report of child abuse. Police are interested in determining whether a crime was committed, identifying the perpetrator, and ascertaining whether physical evidence is available. Protective services workers must determine whether an abuse has occurred and whether the child should be taken into custody for his or her own protection. Individuals from both disciplines argue that their disparate missions cannot be satisfied simultaneously.

Second, due to the sheer volume of cases being reported, police prefer not to be involved in a case until it has been substantiated by the child protection agency. Typically, substantiating a case requires at least one interview with the child (and with other family members, friends, neighbors, etc.) by the protective services worker. Indeed, having a social worker perform this preliminary "screening" may be the preferred approach in many cases, as it precludes the need for a uniformed officer to respond to the scene. Instead, substantiated reports can be referred directly to the detective responsible for case investigation.

Finally, the distrust that sometimes exists between police and social services agencies cannot be ignored as an obstacle to coordinated interviews. "Front line" workers in each agency must trust each other's motives and actions before they will defer to the other's judgment in handling the initial interview.

Another joint interview technique is having one person question the child while the others observe from behind a one-way mirror. Observers could feed questions to the interviewer via a "bug in the ear." One drawback to this approach is the difficulty in scheduling a time convenient to several people, including the child. Also, an interview that attempts to serve multiple purposes tends to become protracted; since young children have very short attention spans, lengthy interviews could be counterproductive.

Assigning Specialized Personnel

Police departments have long had vice squads and youth divisions. More recently, prosecutors have instituted sex crimes units and major offense bureaus. In some communities, as in Seattle, even the child protection agency has a special sexual abuse unit. Specialized units have the dual advantages of highly trained and committed staff and the ability to pursue "vertical" techniques of case management. It is this latter benefit, having a single individual responsible for a case from initial assignment through final disposition, that contributes most to reducing the number of interviews a child victim must endure.

In the ideal situation, the assigned personnel from all the agencies would become, formally or informally, a "strike force" dedicated to managing its designated cases in a manner that maximizes the protection afforded to the child. This approach is exemplified in Seattle, where representatives of each involved agency meet weekly to discuss elements of new cases, progress of ongoing cases, and proposals for future improvements. To avoid the need for repeated interviews, one individual questions the child while the others observe from behind a one-way mirror.[5]

A more formalized approach has been adopted in Madison County (Huntsville), Alabama, where a "Children's Advocacy Center" was recently established to handle all cases of child sexual abuse. Based in a residential building that was purchased expressly for this purpose, the Center houses specialists from each of the relevant agencies, including physicians and therapists. A prosecutor/law enforcement/protective service team conducts all interviews with the child, on videotape where appropriate.[6]

Of course, the arrangements described above rely on friendly relationships among personnel in the various agencies, a condition that simply does not exist in many communities. Also, in some jurisdictions, such as the District of Columbia, there are legal barriers to sharing information among agencies. There, confidentiality laws require an agency to obtain a written waiver every time it wishes to consult with another agency.[7] Elsewhere, a blanket waiver should suffice.

The Videotaped Interview

As was noted above in Chapter 6, many jurisdictions are using videotape to record the child's first statement and thereby reduce the number of future interviews, even where there is no statutory authority to introduce this videotape at trial. The advantages and disadvantages of videotaping were discussed earlier; here, it will suffice to remind the reader that young children sometimes waver on even the most neutral subjects, potentially making the videotape a liability in states with liberal discovery laws.

Eliminating Formal Appearances

Both the National Legal Resource Center for Child Advocacy and Protection[8] and the Attorney General's Task Force on Family Violence[9] urge that child victims not be required to testify in person at preliminary hearings. As the Task Force explained in its Final Report,

> The preliminary hearing is not a trial. It is the initial judicial examination of the facts and circumstances of the case where the court determines only whether the evidence is sufficient to continue with further prosecution. . . . Consistent with state procedures, a videotaped statement, testimony by the child to a law enforcement investigator, or other such presentations should be adequate. . . . Children should not be required to testify in person.[10]

The National Legal Resource Center for Child Advocacy and Protection extends this recommendation to grand jury proceedings as well.[11] And, in fact, prosecutors have reported that they do avoid putting the child on the stand for preliminary hearings and grand juries wherever possible.[12]

Coordinating the Criminal and Juvenile Justice Systems

A final way to reduce the number of interviews required of the child, also recommended by the National Legal Resource Center for Child Advocacy and Protection,[13] is to coordinate the criminal and juvenile court proceedings that typically follow a report of intrafamilial child abuse. Often, the two courts proceed concurrently, yet independently of each other, confusing the child and sometimes resulting in

inefficiencies or conflicting orders. For example, a juvenile court may grant a dependency petition, thereby placing a child in shelter care, when the criminal court has already issued a no-contact order on the defendant. As another example, some defendants have effectively nullified no-contact orders issued by the criminal courts by obtaining visitation rights from the juvenile or family courts. Also, in some jurisdictions, dependency proceedings are suspended until the criminal case is resolved. As a result, the child and family may not receive needed social services, and because there is no mechanism to enforce no-contact orders, the perpetrator may re-enter the home to re-abuse the child or pressure the child to recant.[14]

In several of the sites we visited, judges in the criminal court said they learned of juvenile court proceedings only fortuitously. As we discussed in Chapter 9, guardians ad litem appointed in the juvenile court were not routinely notified of criminal proceedings involving their clients. In Ventura, prosecutors handling the criminal case did not confer with their colleagues in the juvenile division, since some of the information arising from the juvenile proceeding is inadmissible in criminal court. But there is no reason why information supplied by the child cannot be shared among personnel in the two courts.

Coordination of the two court systems can be accomplished in several ways. A special prosecutorial unit could be assigned to handle both criminal and juvenile aspects of child abuse cases, as in New Orleans. A protocol could be developed to ensure joint decisionmaking by prosecutors from the juvenile and criminal divisions, as in Madison, Wisconsin.[15] The guardian ad litem appointed in juvenile court could continue to assist the child in criminal court, as in Des Moines and Orlando. Or, in states where the juvenile court retains jurisdiction over the criminal prosecution of abuse/neglect cases, the same judge could hear both cases. Some small jurisdictions, such as Washington County, Vermont, hold juvenile and criminal proceedings in the same courtroom on the same day with the same judge. Such procedures not only alleviate the burden on the child, but also help to streamline and rationalize the criminal justice/child protection systems.

Expediting Cases

Often, and particularly in cases involving child witnesses, it is in the defendant's interest to prolong proceedings, wagering on the child's failing memory and desire to forget and move on. But the justice system does not forget, and although the court may allow numerous continuances, the child remains on call.

Continuances can sometimes benefit the prosecution, for example, when the child is recanting. But more often, the effect of repeated continuances is devastating, both to child victims and to the quality of their testimony. Psychiatrists working with child witnesses to parental homicides assert that "each trial postponement can cause renewed anxiety until, perhaps, anxiety related to the original memories of the event is shifted to the court proceedings."[16] Preliminary findings of a study of child sexual abuse victims, conducted by the University of North Carolina Medical School, suggest that court delay may be a causative factor in the retraction phenomenon so often seen in these cases. How can cases involving child victims be adjudicated more quickly and efficiently?

Both the National Conference of the Judiciary on the Rights of Victims of Crime[17] and the Attorney General's Task Force on Family Violence[18] urge that trials involving sensitive victims be expedited. Our statutory review revealed that several states, including California, Colorado, and Wisconsin have enacted legislation intended to expedite cases involving child witnesses. Wisconsin's law, which became effective in April 1984, provides that:

> **Wis. Stat. 971.105.** In all criminal cases and juvenile fact-finding hearings . . . involving a child victim or witness, . . . the court and the district attorney shall take appropriate action to ensure a speedy trial in order to minimize the length of time the child must endure the stress of his or her involvement in the proceeding. In ruling on any motion or other request for a delay or continuance of proceedings, the court shall consider and give weight to any adverse impact the delay or continuance may have on the well-being of a child victim or witness.

California's law, in contrast, is more authoritative:

> **Calif. §1048.** However, all criminal actions wherein a minor is detained as a material witness, or wherein the minor is the victim of the alleged offense, . . . shall be given precedence over all other criminal actions in the order of trial. In such actions continuations shall be granted by the court only after a hearing and determination of the necessity thereof. . . .

Practically, however, these laws are rarely invoked. According to prosecutors in Ventura, every case involves at least one continuance, for several reasons. For example, attempts to schedule an early trial may be thwarted if the defendant claims there is inadequate time to prepare an effective defense. Also, there are always competing cases on the court's calendar, other cases that likewise demand priority scheduling. To avoid the problem of competing criminal cases, the Attorney General's Task Force has suggested creating a special docket exclusively for family violence cases (which would include spouse and elder abuse as well as child abuse).[19] In both Wisconsin and California, judges and prosecutors assured us that, in the absence of resources to build new courtrooms and appoint more judges, these laws constitute little more than an attempt to encourage judicial and prosecutorial vigilance against unwarranted requests for continuances.

* * *

Given the nature of the American justice system, there is probably some minimum number of interviews to which every witness, including children, must submit. Similarly, there often are perfectly justifiable reasons for delay. These facts may seem intuitively obvious to an adult, but to a child they may be puzzling, at best, or even overwhelming. Though there are ways to streamline the adjudication process, all depend on some level of cooperation among the agencies involved--a quality that cannot be legislated or mandated. Instead, it must come about through the joint efforts of some very committed people.

FOOTNOTES

1. Attorney General's Task Force on Family Violence, Final Report, September 1984, p. 15.

2. Ibid.

3. National Legal Resource Center for Child Advocacy and Protection, Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases (Washington, D.C.: American Bar Association, 1982), p. 10.

4. See, for example, Colorado House Joint Resolution No. 1003 (1983), urging investigators and staff of law enforcement and social service agencies and district attorneys' offices either to conduct joint interviews, assign a single investigator to question the child, or develop an integrated, community-based approach; Maryland §5-905 (1984), directing the agencies responsible for investigating child sexual abuse to implement a joint investigation procedure; and Florida S.B. 138 (1984), Section 7, directing the chief judge of each judicial circuit to provide, by order, reasonable limits on the number of interviews.

5. See U.S. Department of Justice, National Institute of Justice, Assisting Child Victims of Sexual Abuse, by Debra Whitcomb (Washington, D.C.: Government Printing Office, 1982).

6. Robert E. Cramer, Jr., "The District Attorney as a Mobilizer in a Community Approach to Child Sexual Abuse," in National Legal Resource Center for Child Advocacy and Protection, Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases (Washington, D.C.: American Bar Association, forthcoming).

7. Supra, note 5.

8. Supra, note 3 at p. 11.

9. Supra, note 1 at pp. 27, 33.

10. Ibid., pp. 32, 38.

11. Supra, note 3 at p. 11.

12. National Legal Resource Center for Child Advocacy and Protection, Innovations in the Prosecution of Child Sexual Abuse, ed. Josephine Bulkley (Washington, D.C.: American Bar Association, 1981), p.4.

13. Supra, note 3 at p. 8.

14. Naomi M. Post, "Criminal and Civil Court Coordination," in National Legal Resource Center for Child Advocacy and Protection, Papers from a National Policy Conference on Law Reform in Child Sexual Abuse Cases (Washington, D.C.: American Bar Association, forthcoming).

15. Ibid.

16. Robert S. Pynoos and Spencer Eth, "The Child as Witness to Homicide," Journal of Social Issues, Vol. 40 (1984): 103. Similar effects have been reported in preliminary findings of the "Child Mental Health Evaluation Project" conducted by the University of North Carolina Medical School.

17. U.S. Department of Justice, National Institute of Justice, Statement of Recommended Judicial Practices, Adopted by the National Conference of the Judiciary on the Rights of Victims of Crime (Rockville, MD: National Criminal Justice Reference Service, 1983), p. 12.

18. Supra, note 1 at pp. 33, 41.

19. Ibid., p. 41.

PART III

CONCLUSIONS AND RECOMMENDATIONS

XI. CONCLUSIONS AND RECOMMENDATIONS

Like it or not, allegations of child sexual abuse have become newsworthy in recent months. The fallout of all this publicity has been mixed. On the negative side, children and their families are needlessly thrust into the public eye and subjected to insensitive probing and scrutiny by reporters anxious for a "scoop." On the positive side, the heightened media attention has raised our awareness of the child's plight in the criminal justice system. Interest runs especially high in the potential for introducing modern technology to alleviate the stress on child victims. Videotape and closed circuit television, in particular, have received much media play and legislators have been pressured to adopt these controversial measures with limited opportunity for reflection and study.

Our research leads us to conclude that too much attention is presently directed to legislative reforms permitting innovative practices that benefit only a handful of the growing number of children enmeshed in the criminal justice system. A large portion of the effort now devoted to statutory reform might be more productively focused toward alternative techniques that are less dramatic, yet equally--or even more--effective. In other words, creative exploitation of resources that are already available might achieve many of the same goals without threatening the structural premises of American law.

The use of videotape is a good example. There is no reason (save resources) why a child's first statement cannot be videotaped strictly for investigative purposes; indeed, many jurisdictions are already doing this. As described in Chapter 6, the procedure has certain advantages, even if the resulting videotape cannot be introduced into evidence under a special law. In fact, in Minnesota, where there is no videotape statute,

prosecutors have succeeded in introducing a videotape of a child's extra-judicial statement under a rule of evidence that admits prior consistent statements to rebut charges of fabrication.[1] Similarly, states that have adopted a "residual" exception to hearsay similar to Rule 603 of the Federal Rules of Evidence already possess authority to admit certain out-of-court statements made by a child under circumstances that fail to qualify under other hearsay exceptions.

On the other hand, some innovations may lie too far beyond the boundaries of traditional courtroom protocol to introduce without benefit of statutory authorization. The California Appeals Court[2] has clearly placed closed circuit television in this category, when it held that the inherent powers of the trial court could not be used to justify this practice. Similarly, in Colorado, an attempt to introduce a child's out-of-court statement that failed to fit one of the available hearsay exceptions was disallowed by the Court of Appeals because the Colorado legislature had explicitly rejected adopting a residual hearsay exception.[3] (The state has since enacted a special hearsay exception for child sexual abuse victims.)

Our interviews with prosecutors and victim advocates suggest that virtually every cause of stress on a child witness can be ameliorated to some extent with practices that fall squarely within the trial court's discretion. Exhibit 6 lists the commonly mentioned causes of stress, several alternative procedures, and the conditions necessary before invoking the procedures (i.e., statute, case law, or judicial discretion). As the exhibit shows, there are many effective techniques that require little more than slight modifications to courtroom tradition. These include, for example:

- Aids to communication. By now most prosecutors should be familiar with the anatomically complete dolls that therapists use to help child victims explain what happened to them. Many courts have permitted children to use them during testimony as demonstrative evidence.[4] And every prosecutor should be conscious of the need to scale down his or her vocabulary to meet the child's level.

Exhibit 6

SUMMARY OF PROPOSED REFORM MEASURES

Cause of Stress	Suggested Procedure	Necessary Conditions
Pretrial Period		
Repeated interviews	Videotape first statement	Discretion
	Coordinate court proceedings	Discretion
	Joint interviews/one-way glass	Discretion
Time to disposition	Priority scheduling	Discretion, Statute
Repeated schedule changes	Limit continuances	Discretion
Removal of child from home, retaliation	No contact orders or removal of offender	Statute
Fear of unknown	Thorough preparation	Discretion
	Tour of courtroom	Discretion
Victim/Family exposed in media	Media cooperation in suppressing identifying information	Discretion
Court Proceedings		
Physical attributes of courtroom	Alternative setting for child's testimony	Statute
	Tour of courtroom	Discretion
	Small witness chair	Discretion
	Judge sits at witness' level	Discretion
Audience, jury	Exclude spectators	Statute
	Videotaped deposition	Statute
	Closed circuit television	Statute
	Ask spectators to leave	Discretion
Defendant's Presence	Closed circuit television	Statute
	Blackboard as screen	Case law
	Alternative seating arrangements	Case law
	Instructing the child to look elsewhere, to tell the judge if the defendant "makes faces"	Discretion

Exhibit 6 (cont.)

Court Proceedings (cont.)

Description of Events	Res gestae	Case law
	Expert witnesses to explain apparent lapses in child's testimony	Case law
	Presence of victim advocate	Statute, Discretion
	Dolls, artwork	Discretion

- Modifying the physical environment. Providing a smaller chair for child witnesses, sitting at their level, and wearing business clothes rather than formal courtroom attire are simple things judges have done to help child witnesses feel more at ease.

- Preparing the child. Many prosecutors and victim advocates spend a great deal of time preparing child witnesses for the experience of testifying. They brief children on the roles of people in the courtroom and the range of possible outcomes. They introduce them to a judge. They take them for a tour of the courtroom, show them where their support person and the defendant will be, let them sit on the witness chair and speak into the microphone. They explain the proceedings and let the children ask questions--this may be the only opportunity to find out what worries each child as an individual.

In fact, by supporting the child through all the pretrial activities--by reducing the number of interviews or continuances, for example--and thoroughly preparing the child for the courtroom experience, prosecutors are more likely to have a strong witness at trial. Such precautions should be provided to every child coming into the system, not only those whose cases actually come to trial or whose emotional well-being is severely threatened by the prospect of testifying. By applying these precautions across the board, drastic interventions--like closed circuit television and videotaped depositions in lieu of live testimony--should only be necessary in the most extraordinary cases. These measures should not, indeed, cannot be seen as panaceas.

Recommendations

There are, however, two areas of statutory reform that we believe are both necessary and beneficial to many child witnesses. The first is abolishing special competency requirements, preferably by establishing a presumption that every witness is competent (as in the Federal Rules) and leaving the determination of credibility to the trier of fact. The need to demonstrate competency is among the most formidable obstacles to prosecuting cases involving child victims, since it is not unu-

sual for them to be the only source of evidence. Since psychological research on children's memory and morality suggests that all but the youngest children (i.e., three-year-olds) can perform on a par with adults, it seems unfair to impose a special requirement on children.

Secondly, we recommend that legislatures adopt special hearsay exceptions to admit certain out-of-court statements that do not fall within the existing exceptions to hearsay. Prosecutors and victim counselors can supply examples of children's statements that appear to possess "sufficient indicia of reliability," yet are inadmissible hearsay. Although such statements certainly cannot be used in every prosecution, they are useful where a case faces dismissal because a child "freezes" or recants on the witness stand, or to rebut defense charges of fabrication. States that lack a "residual" hearsay exception should adopt a special exception for children.

Regardless of the existing statutory structure in their states, prosecutors must learn to maximize the avenues available to them. Larger prosecutors' offices should have specialized units dealing with sexual abuse cases or with cases involving child victims; smaller offices should designate one or two attorneys to receive training or specialize in this area. Training should be provided, not only in general concepts of child development and family dynamics, but also in the specifics of state law and case precedent. The expertise of child development specialists and mental health professionals should be tapped for assistance in interviewing children and understanding their responses. Above all, prosecutors must recognize that these cases require a heightened level of commitment. Prosecutors should work to improve communication and coordination among the several agencies responsible for children's welfare. They should meet frequently with law enforcement officers and protective services workers to discuss ongoing cases and to identify and correct problems. Only through a concentrated team effort can we hope to develop a rational, cohesive approach to the adjudication of crimes against children.

The first full interview with a child victim or witness should be conducted by someone with specialized training and skills in interviewing children. Most importantly, interviewers must know how to elicit information without imposing their own biases, thereby suggesting certain answers, and how to structure their questions in a way that is

understandable to children. The need for careful, compassionate, yet rigorous questioning of child witnesses has become more apparent as more unfounded allegations have come to light. For example, interviewers should know how to probe, with sensitivity, a child's motivation for disclosing abuse: Is she seeking help in extricating herself from an intolerable situation, or is she being used as a pawn in a bitter divorce/custody dispute? Or, has a well-meaning parent unintentionally misconstrued the child's innocent remark? Whether this interview is conducted by a police officer, social worker, or mental health professional is secondary to the interviewer's level of skill and sensitivity in working with children.

Each child should have a victim advocate/guardian ad litem for support throughout the investigation and adjudication processes. Ideally, such an appointment would be made upon first report of abuse; logistically, however, this may not be possible. Where prosecutors do not have access to a victim/witness assistance unit, provision should be made for volunteer support or carrying over the guardian ad litem function from juvenile court proceedings. Support persons should attend the same specialized training given to prosecutors so they can advocate for the child's best interests from a knowledgeable standpoint.

Judges, especially, must be aware of children's unique situation in the criminal court setting. Some of the persons we interviewed objected to any intervention on behalf of a witness in a courtroom, on grounds that it prejudices the jury to believe the allegation of victimization. We contend, however, that certain departures are necessary for child witnesses simply because they are children. Before a child takes the stand, the judge can set certain "ground rules" for the attorneys' behavior, for example, by drawing an invisible line around the witness chair, within which the attorneys may not approach the child, or cautioning the attorneys against raising their voices. During examination of a child witness, judges must be alert to lines or forms of questioning that confuse or intimidate the child. They must recognize signs of discomfort or embarrassment that may cloud or distort the child's testimony, and then take the initiative, for example, to call a recess in order to identify and remedy the source of the child's distress. Where possible, and where the prosecutor fails to file a motion, judges should order alternative procedures sua sponte. They should avoid granting continuances unless absolutely necessary, and they should ensure that every child has a suppor-

tive friend or advocate during trial. In sum, judges must accept a more active role in overseeing the child's participation at trial.

There is also a need for judges to reconsider the instructions given to the jury when contemplating a child's testimony. Although it may be wise to caution the jury about the apparent limitations of a child's memory and susceptibility to suggestion, judges should ensure that their remarks do not cast unwarranted dispersions on the child's testimony.

Research Needs

Variability in children's personalities and in the nature of their victimizations suggests that the criminal justice system will have equally variable impacts. Because the more radical reforms may pose serious threats to constitutional guarantees, they must be applied narrowly and presumably to those cases where serious psychological damage can be shown. The Globe decision (see discussion in Chapter 4) underscored the need for empirical research attempting to correlate victim and offense characteristics to the need for specific interventions at trial.

What do children know about the criminal justice system? Presumably, much of their prior knowledge would come from television. Do media portrayals make children more or less fearful of police, courts, judges, and jail? How do media impressions affect the child's interactions with criminal justice personnel? These questions have not yet been addressed in the empirical literature, yet the answers should have important implications for adapting the system in ways that better address children's concerns.

There is considerable demand for knowledge in the area of interviewing techniques. Mental health professionals have learned much about extracting information from unwilling or frightened children, but their techniques may falter under judicial scrutiny. On the other hand, traditional investigative questioning may not only fail to produce the required answers, but may have the unintended effect of exacerbating the child's fears. Through research, we should be able to identify the "best" techniques from both disciplines and synthesize them into an effective interview "package," to accompany appropriate training.

We need to explore further the advantages and disadvantages of appointing legal counsel for child witnesses in criminal proceedings.

What, if any, are the legal barriers? What are the practical constraints, and how may they be overcome? Can and should a guardian ad litem program be implemented in the criminal courts?

Although there has been some research into the differential effects of videotaped versus live presentations on jurors' perceptions, there is much to be learned. What are the effects of electronic technology on witnesses, on lawyers, on judges? Do they behave differently when cameras are poised at them? Are jurors more or less likely to believe a taped witness than live testimony? Are children any more or less candid than adults under these circumstances?

Legal scholars and social science researchers should be much farther along in their answers to questions like these before more legislatures and courts jump on the technology bandwagon. Meanwhile, much can be done without drastic statutory reform, by formulating creative interpretations of available statutes and case law precedent. These techniques, far less dramatic and controversial than the proposed uses of electronic technology, may be no less effective in most cases. They must not be overlooked in our desire to move the courts into the age of technology.

FOOTNOTES

1. See, for example, Hennepin County v. Sullivan, No. CX-84-807 (Minn. App. 1984), citing Minn. R. Evid. 801(d)(1)(B).

2. Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984).

3. In Re: W.C.L. Jr., 650 P.2d 1302 (Colo. App. 1982).

4. See, for example, Newton v. State, 456 N.E.2d 736 (Ind. App. 2 Dist. 1983), and Ohio v. Lee, 9 Ohio App. 3d 282 (1983).

APPENDIX A

INTERVIEWING CHILD VICTIMS

GUIDELINES FOR CRIMINAL JUSTICE SYSTEM PERSONNEL*

BACKGROUND INFORMATION

The following issues affect the child's ability to give a history of sexual assault and influence the cooperativeness of victim and family.

I. **Child's Developmental Level**

A child's cognitive, emotional and social growth occurs in sequential phases of increasingly complex levels of development. Progression occurs with mastery of one stage leading to concentration on the next.

Cognitive--Preconceptual, concrete, intuitive thinking in the young child gradually develops toward comprehension of abstract concepts. Time and space begin as personalized notions and gradually are identified as logical and ordered concepts.

Emotional--The young child perceives her/himself egocentrically with little ability to identify her/himself in context. S/he is dependent on the family to meet all needs and invests adults with total authority. The child often reflects the emotional responses of the parents. S/he gradually shifts to greater reliance on peer relationships and emotional commitments to people outside the family.

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Behavioral--The young child is spontaneous, outgoing and explosive with few internal controls and only a tentative awareness of external limits. S/he has a short attention span. A child most often expresses feelings through behavior rather than verbally. As the child grows, s/he develops internal controls and establishes a sense of identity and independence. Peers and other adults have increasing influence on behavior.

II. **Sexual Assault**

Characteristics of the assault affect the child's emotional perception of the event and to a great extent determine the response. The closeness of the child's relationship to the offender, the duration of the offense, the amount of secrecy surrounding the assault, and the degree of violence are the factors which have the greatest impact on the child's reaction. The child may very well have ambivalent feelings toward the offender or be dependent on him for other needs.

III. **Response to Child**

The child is fearful of the consequences of reporting a sexual assault. The response of the family support system and official agencies will directly affect the resolution of the psychological trauma and her/his cooperativeness as a witness. The child fears s/he will be disbelieved or blamed for the assault and almost always is hesitant about reporting.

INTERVIEWING CHILD VICTIMS

I. **Preparing for Interview**

Prior to interviewing the child, obtain relevant information from parents/guardian, and, if applicable, Child Protective Services caseworker, physician, and/or Sexual Assault Center/Rape Relief counselor.

A. Explain your role and procedures to above personnel, and enlist their cooperation.

B. Determine child's general developmental status: age; grade; siblings; family composition; capabilities; ability to write, read, count, ride a bike, tell time, remember events; any unusual problems; physical, intellectual, behavioral; knowledge of anatomy and sexual behavior; family terminology for genital areas.

C. Review circumstances of assault (as reported already by child to other person): what, where, when, by whom, and to whom reported; exact words of child; other persons told by child; how many have interviewed child; child's reaction to assault; how child feels about it and what, if any, behavioral signs of distress (nightmares, withdrawal, regression, acting out) have occurred.

D. Determine what reactions and changes child has been exposed to following revelation of the assault(s): believing; supportive; blaming; angry; ambivalent; parents getting a divorce; move to a new home.

II. **Beginning the Interview**

A. Setting--The more comfortable for the child, the more information s/he is likely to share.

1. Flexibility--A child likes to move around the room, explore and touch, sit on the floor or adult's lap.

2. Activity--Playing or coloring occupy child's physical needs and allows her/him to talk with less guardedness.

3. Privacy--Interruptions distract an already short attention span, divert focus of interview, and make self-conscious or apprehensive child withdraw.

4. Support--If the child wishes a parent or other person present, it should be allowed. A frightened or insecure child will not give a complete statement.

B. Establishing a Relationship

1. Introduction--Name, brief and simple explanation of role, and purpose: "I am the lawyer (or legal person) on your side; my job is to talk to children about these things because we want them to stop happening."

2. General exchange--Ask about name (last name), age, grade, school and teacher's name, siblings, family composition, pets, friends, activities, favorite games/TV shows. (It often helps to share personal information when appropriate, e.g., children, pets.)

3. Assess level of sophistication and ability to understand concepts--Does child read, write, count, tell time; know colors or shapes; know the day or date; know birthdate; remember past events (breakfast, yesterday, last year); understand before and after; know about money; assume responsibilities (goes around neighborhood alone, stays at home alone, makes dinner, etc.)

III. **Obtaining History of Sexual Assault**

A. Preliminaries

1. Use language appropriate to child's level; be sure child understands words. (Watch for signs of confusion, blankness, or embarrassment; be careful with words like incident, occur, penetration, prior, ejaculation, etc.)

2. Do not ask WHY questions ("Why did you go to the house?" "Why didn't you tell?") They tend to sound accusatory.

3. Never threaten or try to force a reluctant child to talk. Pressure causes a child to clam up and may further traumatize her/him.

4. Be aware that the child who has been instructed or threatened not to tell by the offender (ESPECIALLY if a parent) will be very reluctant and full of anxiety (you will usually notice a change in the child's affect while talking about the assault). The fears often need to allayed.

--"It's not bad to tell what happened."
--"You won't get in trouble."
--"You can help your dad by telling what happened."
--"It wasn't your fault."
--"You're not to blame."

5. Interviewer's affective response should be consonant with child's perspective of assault (e.g., don't emphasize jail for the offender if the child has expressed positive feelings toward him.)

6. Ask direct, simple questions as open-ended as allowed by child's level of comprehension and ability to talk about the assault.

B. Statement

1. WHAT

--"Can you tell me what happened?"
--"I need to know what the man did."
--"Did he ever touch you? Where?"
--"Where did he put his finger?"
--"Have you ever seen him with his clothes off?"
--"Did you ever see his penis (thing, pee wee, weiner) get big?"
--"Did anything ever come out of it?"
Once basic information is elicited, ask specifically about other types of sexual contact.

--"Did he ever put it into your mouth?"
--"Did he ever make you touch him on his penis?"

2. WHO

Child's response here will probably not be elaborate. Most children know the offender and can name him, although in some cases the child may not understand relationship to self or family. Ascertain from other sources what is the exact nature/extent of the relationship.

3. WHEN

The response to this question will depend on child's ability, how recently assault happened, lapse between last incident and report, number of assaults (children will tend to confuse or mix separate incidents). If the child is under six, information re: time is unlikely to be reliable. An older child can often narrow down dates and times using recognizable events or associating assault with other incidents.

--"Was it before your birthday, the weekend, Valentine's Day?"
--"Was it nighttime or daytime?"
--"Did it happen after dinner, 'Happy Days', your brother's bedtime?"

4. WHERE

The assault usually occurs in the child's and/or offender's home. Information about which room, where other family members were, where the child was before assault may be learned.

5. COERCION

What kind of force, threat, enticement, pressure was used to insure cooperation and secrecy?

--"Did he tell you not to tell?" "What did he say?"
--"Did he say something bad would happen to you or you would get in trouble if you told?"
--"Did the man say it was secret?"

C. Assessing credibility and competency

1. Does a child describe acts or experience to which s/he would not have normally been exposed? (Average child is not familiar with erection or ejaculation until adolescence at the earliest.)

2. Does child describe circumstances and characteristics typical of sexual assault situation? ("He told me that it was our secret"; "He said I couldn't go out if I didn't do it"; "He told me it was sex education".)

3. How and under what circumstances did child tell? What were exact words?

4. How many times has child given the history and how consistent is it regarding the basic facts of the assault (times, dates, circumstances, sequence of events, etc.)?

5. How much spontaneous information can child provide? How much prompting is required?

6. Can child define difference between truth and a lie? (This question is not actually very useful with young children because they learn this by rote but may not understand the concepts.)

IV. **Closing the Interview**

A. Praise/thank child for information/cooperation.

B. Provide information

1. Child--Do not extract promises from child regarding testifying. Most children cannot project themselves into an unknown situation and predict how they will behave. Questions about testifying in court or undue emphasis on trial will have little meaning and often frighten the child (causing nightmares and apprehension).

2. Parent--Provide simple, straightforward information about what will happen next in the criminal justice system and approximately when, the likelihood of trial, etc.

3. Enlist cooperation--Let them know who to contact for status reports or in an emergency; express appreciation and understanding for the effort they are making by reporting and following through on process.

D. Answer questions; solicit responses.

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APPENDIX B

CONDITIONS IMPOSED ON THE USE OF THE VIDEOTAPED PRESENTATION*

(CLOSED-CIRCUIT TELEVISION)

1. The testimony of the child victim shall be taken in a room near the courtroom from which video images and audio information can be projected to courtroom monitors with clarity.

2. The persons present in the room from which the child victim will testify ("testimonial room") shall consist, in addition to the child, only of the prosecuting and defense attorneys together with the cameraman.

3. The only video equipment to be placed in the testimonial room shall be the video camera and such tape recording equipment as may be appropriate to carry out the conditions herein set forth.

4. The courtroom shall be equipped with monitors having the capacity to present images and sound with clarity, so that the jury, the defendant, the judge, and the public shall be able to see and hear the witness clearly while she testifies. The following monitors are deemed to be satisfactory insofar as screen size is concerned: Jury -- 25"; public -- 18"; defendant -- 10"; judge -- 7."

5. It shall not be necessary to conceal the video camera. A videotape shall be made containing all images and all sounds projected to the courtroom which tape shall be introduced in evidence as a state exhibit.

6. No bright lights shall be employed in the testimonial room.

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*New Jersey v. Sheppard, Docket #I 0822-12-83 (Committee on Opinions, September 27, 1984).

7. Color images shall be projected to the courtroom by the video camera.

8. The video camera shall be equipped with a zoom lens to be used only on notice to counsel who shall have an opportunity to object.

9. The video camera, the witness and counsel shall be so arranged that all three persons in the testimonial room can be seen on the courtroom monitors simultaneously. The face of the witness shall be visible on the monitors at all times, absent an agreement by counsel or direction by the court for some other arrangement. The placement of counsel in the testimonial room shall be at the discretion of each counselor.

10. The defendant and his attorney shall be provided by the State with a video system which will permit constant private communication between them during the testimony of the child witness.

11. An audio system shall be provided connecting the judge with the testimonial room to the end that he can rule on objections and otherwise control the proceedings from the bench.

12. In the event testimony is being recorded by use of a mechanical system, the video monitors or one of them shall be so connected to that equipment as to record all of the child witness's testimony.

13. In the event the proceedings are being recorded by a court stenographer, that stenographer shall remain in the courtroom and shall rely upon the video monitors for the purpose of recording the testimony of the child victim.

14. All video equipment, the videotape and the cameraman, shall be provided by and at the expense of the State.

15. The oath of the child witness may be administered by the judge using the audio equipment, or by the court clerk who may enter the testimonial room for that purpose only, or otherwise as the judge may direct.

16. The testimony of the child victim shall be interrupted at reasonable intervals to provide the defendant with an opportunity for person-to-person consultation.

17. The trial court, before the child victim testifies, shall provide the jury with appropriate instructions concerning the videotape presentation.

18. These conditions have been adopted by the court after counsel has been provided with the opportunity to make objections to them.

APPENDIX C

GUIDELINES FOR VIDEOTAPING A CHILD'S STATEMENT*

Who should take the statement? Someone trained in dealing with children; e.g., a police detective, social services investigator, or investigator from the prosecutor's office.

Where should the videotape be made? In a room specially set aside for this purpose. Avoid proximity to distracting noises. Allow the child to sit comfortably but not to move beyond the range of the camera.

What equipment is necessary? Camera, tripod, recording equipment, television monitor, clock, calendar, and anatomically complete dolls. Explain the taping equipment to the child as the interview begins; this should reinforce the need for the child to tell the truth.

When should the tape be made? As soon as possible. This should be the first time the authorities hear the child tell what happened. Interview other witnesses beforehand to learn enough to ask the child appropriate questions, but do not interview the child prior to taping.

What format should be used in making the tape? Only the interviewer and the child should be present in the room. Follow these steps:

- Seat the child on the "stage" and explain what is happening.
- Prepare the equipment, meanwhile explaining it to the child.

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*Adapted from Steve Chaney, "Recommended Procedure for Videotaping a Child Who Is a Victim of an Offense to Comply with Art. 38.071, Sec. 2, Code of Criminal Procedure," Fort Worth, Texas, August 31, 1983.

- Join the child on the "stage," introduce yourself and your purpose. Ask the child's name and attempt to determine, through appropriate questions, the child's level of development, understanding, and ability to take an oath. Introduce the dolls. Try to establish the date, place, and time the abuse occurred. Once the child begins to discuss the offense, let the child do the talking as much as possible.

- When the interview ends, stop the recorder and note the counter number.

- Play the tape back for yourself and the child.

- Label the tape and the box.

How should the tape be used? To avoid repeated interviews with the child, e.g., by police for investigative purposes, by prosecutor or grand jury in deciding whether to file or indict, by juvenile court in child protection proceedings, by prosecutor in plea bargaining. Because there may be many uses for the videotape, a chain of custody may be difficult to obtain. Preferably, the interviewer can view the tape immediately after it is made and again before it is presented to the court, to assure that there have been no alterations.